NO. 2439

# UNITED STATES CIRCUIT COURT OF APPEALS

## FOR NINTH DISTRICT

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FRANK M. PINDELL,

Petitioner,

vs.

NORMAN J. HOLGATE, as Trustee in Bankruptcy of the Estate of Frank M. Pindell, Bankrupt, and the BANK OF NEZ PERCE,

Respondents.

In the Mater of FRANK M. PINDELL,

Bankrupt.

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## BRIEF OF THE PETITIONER.

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Edwin H. Williams, of San Francisco, California, and Ben F. Tweedy of Lewiston, Idaho, Attorneys for the Petitioner and Bankrupt.

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EUGENE O'NEILL,

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## STATEMENT OF FACTS.

On the 14th of February, 1910, Frank M. Pindell was adjudged a bankrupt. His estate had no other property than the homestead of 160 acres. The stat-

utes of Idaho exempt a homestead to the value of $5000.00, and provide for execution against the excess over $5000.00. It is not necessary to indicate the proceedings under the state statutes upon execution against the judgment debtor's homestead.

But since bankruptcy adjudication, the value of homestead has increased very materially. The value of the homestead has increased from Four or Five Thousand Dollars to Fourteen or Fifteen Thousand Dollars.

The Bank of Nez Perce, before it filed its claim against the estate, got into the early proceedings, instituted by the Referee, to sell the homestead and Mrs. Pindell's property, and pushed with all its might with the Trustee to get an order to sell the homestead and Mrs. Pindel's property, without even having its claim allowed against the estate, or filed.

Mrs. Pindel, to save her own property, intervened and removed the early proceedings from the Referee to the United States District Court, where the issues involved were decided.

Quite a while after the adjudication of bankruptcy, and on the 20th of May, 1911, the United States District Court found that the homestead was then of the value of $9000.00 and that, therefore, the entire 160 acres could not be set

off to the bankrupt as exempt. This adjudication of the District Court need not be set forth in full; for it has been before the Court of Appeals, and was affirmed.

The bankrupt by his then attorneys defended against the sale of his homestead on the ground that it had been partitioned by the state court, and on the ground that it was not of any greater value than $5000.00.

On December 14, 1910, Mrs. Pindell filed an intervention petition before the referee, claiming the personal property, and, also, the bankrupt objected to any order of sale—see fifth paragraph of cross-petition of Trustee, in No. 1999—and on the 30th day of December, 1910, a hearing was had before the Referee—see same fifth paragraph—but Mrs. Pindel removed the proceedings to the United States District Court by petition in intervention on January 5th, 1911, and further testimony was taken by the Referee on February 24th, 1911, and on May 20th, 1911, the District Court rendered his decision—see paragraph sixth of Trustee's cross-petiotion, above trans. p. 15.

So, more than one year lapsed, after the petition in bankruptcy was filed and after the adjudication in bankruptcy, before the 20th of May, 1911—the date of the decision of the District Court, when the

value of the homestead was placed at $9000.00. And from May 20th, 1911, to June, 1913, the value of the homestead had increased from the value of $9000.00 to Fourteen or Fifteen Thousand Dollars, evidently, as Referee found it had increased from Four or Five Thousand to Fourteen or Fifteen Thousand Dollars during the litigation.

Since, during the life of the litigation, the value of the homestead, as found by the Referee, increased from Four or Five Thousand to Fourteen or Fifteen Thousand Dollars by June, 1913, and the estate had no other property, Frank M. Pindell was a bankrupt if, at the time he filed his petition and at the time of the adjudication that he was a bankrupt, he owed only $258.50; so it was not necessary for him to schedule the judgment of the Bank of Nez Perce to get the adjudication that he was a bankrupt on the 14th of February, 1910. Consequently he did not get the court to adjudge him a bankrupt when he was not a bankrupt.

But, since the judgment of the bank was not satisfied of record, it was necessary for the bankrupt to schedule it as a judgment unsatisfied of record, so that notice would be forwarded to the bank to make it file the judgment as a claim against the estate, and so that he could be discharged from all personal liability.

The claim had to be filed against the estate before its allowance could be contested, and before it could be allowed, or paid, or become a charge against the estate.

Trustee and the Bank of Nez Perce against the Referee's suggestion that new notices should be given secured an exparte order of sale from the Referee, and sold the homestead to Mr. Collins, president of the Bank of Nez Perce in June, 1913, and even yet the claim of the Bonk of Nez Perce was not allowed. Its claim had been filed on the 9th of February, 1911.

Thereupon, the bankrupt, having ascertained what was being done, protested, in writing, against the confirmation of sale, and, at the same time, was permitted by the Referee to defend against the allowance of the judgment of the bank against the estate as a claim to be paid from the proceeds of the homestead, and he asked the Referee to ascertain all liability of the estate so that he could pay the same in full, and have all his debts paid, and his estate settled as a solvent estate—becoming so by the increase in its value.

In this way, the present hearing and controversy were brought on before the Referee. The Referee heard the evidence, permitted witnesses to be examined in chief and cross examined, and occupied prac-

tically a month of his time in June, July and August of 1913, and, upon this great volumn of evidence, introduced before him and heard by him, he made his findings of fact, conclusions of law, and his orders, which were reviewed on matters of law by the United States District Court upon petitions for review filed by the Bank of Nez Perce, by the Trustee and by the Trustee's attorney on his own behalf.

*Thus all of them are acting in harmony against the bankrupt,* showing the wisdom of the permission given by the Referee to the bankrupt to defend his own estate after it was seen that the Trustee would not do so. These propositions conclusively indicate the position of the Trustee and, in a measure, explain the great delay in the matter of closing the estate and in permitting the claim of the bank to remain so long unadjusted. We shall now state the defenses of estate against bank's claim. The defenses grow out of the proceedings in the state court. The Referee found that the personal property of the bankrupt was attached on or about June 28th, 1908 on the first writ of attachment which was subsequently dissolved, which property so attached, was, when attached, of the reasonable value of $6522.00; the Referee also found that under private arrangement five attached hogs were sold to a Mr. Morgan for about $57.00; also

that on order of sale of the District Court some of the attached property was sold for $131.50, and that the attached property was wasted, destroyed and injured by the sheriff and his keepers, and that the residue which survived or was saved, was sold at execution sale on the 6th of April, 1909, on an execution issued on the 8th of March, 1909, for about $2000.00; also that Harry Lydon's term of office had expired on the second Monday of January, 1909; also that the judgment was procured on the 15th of February, 1909, in the state court; that Harry Lydon, as the then sheriff of Nez Perce County, attached the personal property which he found to be of the value of $6522.00 when attached, and without returning the attached property to its owner which had been seized under the first writ of attachment, when the first writ was dissolved, continued in possession of the attached property and held it under the second writ of attachment; also that the bankrupt was in the penitentiary when the first writ was levied on the property and was in the penitentiary continuously until a few days before the execution sale in April, 1909; having been granted a full pardon. By section 4070, Revised Codes of Idaho, therefore, the statutes of limitations did not run against the bankrupt during the period of his disability and

the bank can not be excused from liability because of anything done by bankrupt while in penitentiary.

The sum of $57.00, $131.50, and $2000.00 is $2188.50. Therefore $4333.50 is the estate claim against the Bank of Nez Perce. The Referee held that, under the facts, conditions and circumstances, the judgment of the bank could not be allowed as a claim against the estate, since it was either paid and satisfied in full under the rule of law which will be hereafter presented in this brief or was wiped out by the estate's set-off which exceeds the unpaid balance of the judgment very greatly.

The Referee also held that he could not give judgment against the bank in favor of the estate for the excess of the set-off, and the estate, now being represented by the bankrupt by permission of the Referee, agrees with Referee.

For, certainly, no jurisdiction is given by section 68, Bankruptcy Act, 1898, than only on the matter of the allowance of claims, to state the account and to disallow a claim if the estate's set-off equals or exceeds the claim against the estate.

The Referee also held that the total liability of the estate was $631.56, and disaffirmed the sale of the homestead and gave the bankrupt thirty days within which to pay the same to the Trustee, and thereupon

report final settlement of the estate as a solvent estate, since the value of the homestead had increased so greatly, during the life of the litigation.

The findings of fact, conclusions of law, and the orders of the Referee, in words and figures, are as follows, to-wit:

IN BANKRKUPTCY

In the District Court of the United States, in and for the District of Idaho, Central Division.

In the matter of
Frank M. Pendel,
Bankrupt.

This action came on for hearing on the 14th day of June, 1913, on motion of the trustee, Norman J. Holgate, for an order affirming the sale of certain real estate and the settlement of certain accounts and charges attached thereto and praying that they be charged against the exemptions of the bankrupt and objections of the bankrupt to the same and a petition of the bankrupt for an order allowing or disallowing all claims filed against this estate, showing cause why the claim of the Bank of Nez Perce against the estate should not be allowed and setting up a counter claim against said claim and asking a judgment against the Bank of Nez Perce and praying that after the claims are all passed upon and allowed or disallowed and the amount thereof ascertained and the

expenses of the administration of said estate are settled and fixed that he be allowed to pay off said claims and expenses in full and that these proceedings be then dismissed. To the objections and counter claim set up by the bankrupt the Bank of Nez Perce makes answer. On those issues the matter has been heard and the Referee now renders his decision and makes such orders as he thinks just and proper in the premises.

## STATEMENT OF FACTS

After a careful examination of a large mass of evidence introduced before him and the records of the case before him the Referee has found very little conflict considering the length of the litigation involved and in many of these cases he has been able to reconcile them after considering the whole matter. He has been very liberal in his ruling on evidence because there has been a constant claim that the matter has never been considered except by piece meal and he hopes that by having a full and complete hearing at this time that this expensive litigation will be stopped and stopped forever.

It appears that on the 26th day of December, 1907, Frank M. Pendel owed the Bank of Nezperce $2950.00 on overdrafts; that on that date Mr. Dowd, cashier

of said bank at that time, went to the Pindel homestead and asked Mr. Pendel for a note signed by his wife as an accommodation payor; that after much argument and persuasion Mrs. Sarah E. Pendel was induced to sign the note, this note was payable on demand.

Pendell was arrested in March, 1908, on a charge of stealing a steer and was taken to Lewiston and tried and found guilty and was taken to the penitentiary in Boise in May of the same year. After the trial Mrs. Pendel, assisted by two boys, went into the Little Canyon and rounded up 178 head of cattle and took them to Kendrick and sold them for $3831.00. The bank has made serious objection to her making this sale without paying their claim but Mrs. Pendel proves conclusively to me that these cattle were her own personal property.

Mrs. Pendel went to Boise during the month of June of the same year to consult with her husband about securing a pardon and in regard to the settlement of his business affairs. Both Mr. and Mrs. Pendel testify that they talked over the sale of Mr. Pendel's property for the purpose of paying off this note. While she was away the bank brought this action and on the 27th of June had an attachment issued.

When Mrs. Pendel came back from Boise she went to the office of E. O'Neil, attorney for the bank and she and Mr. O'Neil agreed to have the property taken under attachment, sold and the purchase price applied upon the debt; this was on the 10th day of July. Mr. Dowd was called on the phone and told of the agreement and Mrs. Pendel borrowed some stationary from Mr. O'Neill and made a written statement of the terms of the agreement and mailed it to Mr. Dowd (this is creditor's exhibit 19).

Under this agreement five head of hogs were sold by Mr. Dowd to Mr. Morgan on the 14th of July. On the 17th of July Mrs. Pendel called up Mr. Dowd and told him she had a buyer for a small team but Mr. Dowd told her that if she wanted to sell any more she would have to deal with the sheriff.

Mrs. Pendel then secured the services of Attorney I. N. Smith and he filed a demurrer on the 24th of July. The first attachment was quashed and a second attachment was issued on August 13th.

Mrs. Pendel returned again to Boise to take up the matter of the pardon of her husband and in her absence and in the absence of her husband on the 15th of February, 1909, a trial was had and a judgment was entered against the bankrupt and his wife for $3635.16.

On March the 8th an execution was issued and placed in the hands of Harry Lydon, who had made the attachment as sheriff but whose term of office had expired on the second Monday in January and Harry Lydon sold the balance of the grain and stock remaining in his hands on the 6th day of April, 1909, This execution was returned.

On the 6th day of December, 1909, another execution was issued and under this execution proceedings were had in the Probate Court of Nez Perce County looking to the purpose of having the homestead appraised. An appraisement was made by three good and disinterested parties; the bank was not satisfied with this appraisement and they proceeded to ask for another appraisement. Soon after this the bankrupt filed his petition in bankruptcy in this court and was declared a bankrupt.

The Trustee under the direction of Mr. O'Neil seized a large amount of personal property not scheduled in the bankrupt's petition and without an order of the referee, which said property was afterwards claimed by the bankrupt's wife and as such was set off to her by the judge of this court, which order was affirmed by the circuit court of appeals.

A meeting of creditors was called and duly noticed

for the purpose of passing on the question of selling the real and personal property but before the referee could pass upon the matters presented at this meeting the whole proceedings were removed by a petition in intervention to the judge of this court by Mrs. Pendel. The judge passed upon such matters as were before him and made his order to the trustee of January 5th, 1911, which order was affirmed by the circuit court of appeals.

On the 1st day of March, 1913, a petition was filed by Mr. O'Neil and an ex-parte order signed by this Referee directing a sale of the real estate. A sale was had and upon the motion to confirm this sale these proceedings were had before this referee.

Under the first and void attachment the following property belonging to the bankrupt was taken by the sheriff over and above certain other property afterwards set off as exempt to his wife:

| Property | Value |
|---|---|
| 1 Stallion | $ 700.00 |
| 3 Bay mares, weight abaout 1400 | 900.00 |
| 2 Black geldings, weight 1200 each | 500.00 |
| 1 Brown mare, weight about 1300 | 250.00 |
| 3 small saddle or work horses, weight about 1100 | 450.00 |
| 6 Head cattle, not returned | 200.00 |

| | |
|---|---|
| 19 Head hogs | 380.00 |
| 110 Acres of oats at $15.00 per acre | 1650.00 |
| 35 Acres of timothy | 525.00 |
| 30 Acres of Indian allotment of oats and wheat | 450.00 |
| Hay and grain in barn | 100.00 |
| Use of exempt horses while seized and held | 102.00 |
| 13 Acres of Timothy hay destroyed by pasturing | 195.00 |
| Pasture on the Bunce place | 20.00 |
| Total | $6522.00 |

There was no return on the first attachment and a small portion of their property was not returned as attached by the sheriff on his return on the second attachment.

The values set opposite the items are taken from the evidence of Mrs. Pendell supported by the evidence of such reliable and well informed witnesses as W. T. Simmons, John McKinna, William Campbell and others.

In addition to this the bankrupt is asking to set up a claim of damages for $600.00 for the taking of property belonging to Mrs. Pindel which claim I am of the opinion was fully proved and not disproved by the Bank and Mrs. Pindel has agreed to allow this set-off of her claim to be made.

There is no evidence to show that this property was ever returned to the bankrupt or his wife after the dissolution of the void attachment but the cost bill (Bank of Nez Perce exhibit 14 at page 599 trans.) would indicate that none of it ever was.

This property, or all of it that was not destroyed or died, was sold at three sales, one on the 14th of July, 1908, when 5 hogs were sold to Mr. Morgan under the July 10th agreement, one under order of Sept. 18th, 1908, by the district judge of a 2-year old stallion and the balance of the hogs, and one on the 6th day of April, 1909, by Harry Lydon when the grain and the balance of the stock were sold.

The first amounted to about $57.00, the second to $131.50 and the last to about $2000.00. The return on the execution is gone from the record and I can not give the exact figure on this. The amount returned on the last sale is the only amount that has been applied on the judgment (see Judgment docket "aBnk of Nez Perce, Exhibit 17," page 605 trans., Bank's Reply to Answer Brief of Bankrupt page 51, Mr. Dowd's testimony trans. 351).

There was a great amount of grain wasted on the ranch after the attachment and the stock held until the April sale were in very poor condition. Orville M. Collins of Uniontown, Washington, was the pur-

chaser of said stock at said sale and this stock was not in such condition but what they could be restored to normal condition by Mr. Collins by good care and feed before spring work commenced.

The Bank of Nez Perce has gone out of business and this action is continued by its attorney for the benefit of its president, Mr. Collins. This homestead has increased from a value of Four or Five Thousand to Fourteen or Fifteen Thousand Dollars in value during the life of this litigation and Mr. Collins is the purchaser of this land at this sale for $10,500.00. The value has been proven by such reliable and competent witnesses as Mr. Lyons, Mr. Simmons, and others.

The bankrupt was kept in prison until the spring of 1909 when the Idaho State Board of Pardons found that he had been unjustly convicted and gave him a full pardon. The bankrupt was therefore not present during all of these proceedings in the district court and his wife was left to take care of matters the best way she could.

Claims in the amount of $258.50 have been proved and allowed in this estate to date.

## OPINION.

The Referee has covered the important questions of fact and any others that may occur to him as important in passing upon the many questions before him will be mentioned by him as he proceeds to consider the law in connection with the facts in his opinion and the orders resulting therefrom.

He has read with pleasure the extended briefs of counsel for both sides although his work has been difficult at times owing to the failure of attorneys to make specific reference to page and line of the transcript when they refer to the evidence.

It is unfortunate indeed that so much valuable property should have been wasted in so much litigation and the Referee takes up these matters in the same spirit as the court expresses in his letter (Bankrupt's Exhibit 2 Trans. page 456) when he says that he is ready at all times to do anything within the authority of the law which may be necessary to bring about a settlement of the estate with the least possible loss or sacrifice to any of the parties concerned.

It is my opinion that Mr. Dowd expressed his honest opinion of the criminal proceedings in his letter of July 29, 1908, (Bank of Nezperce's Exhibit 24, Trans. p. 621) in the following words: "You still have the elements of manhood in you, if you are in the pen,

and it is my opinion, and the honest opinion of all acquainted with the case, that you didn' get a square deal" and that he would not have protested against the pardon had he not been so advised for the purpose of making Mrs. Pendel "dig up."

The question of the allowance of the claim of Bank of Nezperce appeals to me as the first for my consideration. In his order of the 20th day of May, 1911, the judge of this court directs the sale of this land subject to my direction. This, I take it, leaves the sale largely in my discretion and I am of the opinion that an order of sale of $15,000.00 worth of property for the purpose of paying a total of $258.50 of allowed claims after the time for filing claims had expired, especially for $10,500.00 to Mr. Collins under the circumstances, thereby making a profit to him of four or five thousand dollars in the transaction, or the confirmation of such a sale, would be an abuse of such discretion and wouldnot exhibit the spirit of the court heretofore spoken of.

Counsel for the bank stoutly maintains that the creditors whose claims have been allowed are entitled to interest but I find no law authorizing such interest and it has not been the practice of the court to allow interest on approved claims after their allowance.

The Bank of Nezperce bases its claim wholly on the judgment obtained in the state district court. As against this the bankrupt claims a set-off of certain damages arising from a void attachment, a breached contract and a void execution sale and prays for a judgment for the difference between the amount of such damages and the amount of the claim proved.

The bank insists that if there were any damages that they were not responsible for the acts of the sheriff and his keepers, that under our statutes and the decisions of our supreme court such damages should have been set up as a counter claim in the State Court and the bankrupt having failed to do so they have become merged in the judgment and are now res adjudicata. Otherwise they should be tried out in the state court before a jury maintaining that a jury is a constitutional right.

We might say in passing that a jury is not an unknown quantity in the bankruptcy court and if counsel for the bank had requested one at the beginning of this hearing he could certainly have had one.

Remington on ankruptcy, Sec. 404

The question of set-offs, counter claims and recoupments is covered by Sec. 68a of the Bankruptcy Act of 1898. The term Mutual Credit" as used in equity means a credit agreed upon by the parties, or arising

out of connected transaction (Story Eq. Jur. Sec. 1435) but in bankruptcy statutes "mutual credits" are extended to mean that the parties are, or in the natural course of events will be, creditors of each other. (Lowell Bankr. Sec. 255). So we see in the beginning that the Bankruptcy Courts are inclined to take a broad view of the question of set-offs, counter claims and recoupments.

The position of the bank as to the merger of all damages in the judgment and therefore res adjudicata might be correct if this action had followed the usual course of events, that is if the property taken under a void attachment had been returned to the bankrupt, if there had been no agreement of July the 10th, 1910, and if the property had been retaken and sold at a valid execution sale but this was not the condition of the record.

It seems to me that there is no question but the property sold on the 6th day of April was sold by Mr. Lydon after he had retired from office and under process issued after his term had expired and therefore void.

There is no return on the first attachment and therefore there is nothing to prevent the bankrupt from going behind the attachment and showing the property actually taken by the officer .

This makes the officer a trespasser ab initio (4 Cyc. 607). The return, however, if there was one, would not be conclusive (Jefferson County Savings Bank vs. Shorn Ala.) 4 So. 386) and the attaching plaintiff is liable for the damages caused by the officer and his keepers (Kerr vs. Mount. 28 N. Y. 659).

There being a void attachment and no return and no return of the property to the defendant and a void sale under execution there was a continuing damages from the time the first levy was made up and until the sale was made and therefore the defendants right of action did not fully accrue until after judgment and execution and the defense could not have been set up in an answer or in a cross complaint.

Again the bank repudiated the agreement of July 10th, 1908, and the damages from this breach of contract extended over to the time of the final judgment and I therefore cannot find any reason whatever that the bankrupt cannot urge the damages caused by the void attachment, the breach of agreement and the void execution sale.

It might also be said that the judgment has been fully paid and satisfied (17 Cyc. 1395-1396 and notes 44-45-48-49; Banks vs. Evans, 48 Am. Dec. 734; Brown vs. Kidd, 34 Miss. 291).

The attaching plaintiff has levied on $6522.00 worth of personal property to satisfy a judgment for

$3635.15 or some $3,000.00 more than enough to satisfy the judgment. The levy of an attachment or execution on sufficient personal property of the judgment debtor to pay the judgment amounts prima facie to the satisfaction of the judgment (23 Cyc. 1488-1489, Freeman on Judgments, Vol. 2, 4th Ed. pp. 819-820, Sec. 275, p. 817. The amount of personal property is so much greater than the amount of the judgment that it would only be justice and equity to hold that it has been satisfied under the facts in this case.

I agree with counsel for both sides that there has been much litigation since the 24th day of July, 1908, over this matter but that does not excuse the destruction of so much property.

I do not think it necessary to go into the matter of the manner of the assessment of the damages and computing the interest thereon as the set-off is so much greater than the claim and I am unable to find any authority for entering a deficiency judgment against the bank and in favor of the bankrupt.

It was not only the right but the duty of the bankrupt to examine all claims and advise the Referee as to their correctness (ankr. Act. 1898, Sec. 7a (3) and if the Trustee does not contest an unjust claim, as he

has not in this case, it is the privilege of the Bankrupt to do so.

Remington on Bankruptcy Sec. 826.

In this case it is admitted that the claim of the Bank as originally filed was not correct (Bank's Reply Brief to "Answer Brief of Bankrupt" p. 51).

In all that I have said here I have assumed that there was legal service made on the Bankrupt of the Summons in the original case. The Bankrupt denies this and denies the employment of an attorney to represent him in this case. In the hearing in the case before me on the 8th of August the Bank introduced a number of copies of letters which Mr. O'Neil says passed between him and the wardon of the penitentiary at the time which tend to show that there was service but the proof is very unsatisfactory at the most.

As to the sale I am of theopinion that the petition for sale should have been filed and notices of a hearing on the same. This would have eliminated the cost of a sale under the circumstances surrounding the one made. At the time the ex-parte order was made the Referee suggested this but counsel for the bank and Trustee maintained that the notice given the creditors of the meeting held in December, 1910, was sufficient. He has evidently changed his mind

as indicated by his filing at the August meeting of waivers of notice of a hearing on the part of certain of the creditors. This would not cure a void sale and especially as to notice to Mrs. Pendel who is as much interested in the sale of her homestead as any one could be.

Blood vs. Munn, (Cal.), 100 Pac. 694.

As to the expense of the Trustee for taking and keeping personal property which was not in the schedules and without an order of the court by doing so the Trustee took this property at his own risk and since this property has been held by the District and Circuit Courts to be property belonging to Miss Pindel I do not feel like taking the expense of taking and keeping this property from the estate of the bankrupt.

Remington on Bankruptcy Sec. ———.

I find no authority for allowing the Trustee a per diem for his work in the case. I can allow his expenses in certain cases but he receives as his compensation for his work a commission and nothing else.

I have examined the claim of the attorney for the trustee very carefully and from the circumstances I find that $200.00 is a reasonable and sufficient compensation for all work done by him.

Appended to the report of sale is an accounting which under ordinary circumstances would be set out in a final accounting. I do not know why this was done except for the purpose of having the total amount taken out of the homestead allowance of $5,000.00. This I could not do under the specific directions of the order of the District Judge of May 20, 1911, nor do I find any law for any such proceeding as our statute contemplates that the bankrupt is entitled to the $5,000.00 exemptions under any and all circumstances and this can not be taken from him either by law or by equity or on equitable grounds as claimed by counsel for the trustee and the bank.

Remington vs. Bank, Sec. 2010.

Neither can I hold that the amount assessed against the bankrupt and his wife in the Circuit Court should be assessed against the exemptions of the Bankrupt or against the estate for the reason just stated.

I would not pass on this account at the present time as the Referee has directed that the original receipts and vouchers be filed by the Trustee or his attorney but now after almost a year has expired this has not been done but the bankrupt has prayed for a settlement in the nature of a composition under the

bankruptcy act and I will do the best I can to adjust the whole matter.

Several of the witnesses whose claims for fees in previous hearing is based on testimony given as to the value of the homestead which was material to the consideration of the case in the upper court, I think should be allowed.

I do not think that the trustee is entitled to pay at $3.00 per day for hunting hogs belonging to Mrs. Pendel.

The Referee has the power to assess costs against the losing party in this proceeding.

I have been very liberal in my rulings on evidence because I have wanted the whole matter to come before me and there has been a continual complaint that the case has never been tried out as it should be but only by piece meals.

I don not think that the sum of $10,500.00 is sufficiently large to warrant me in ordering the confirmation of this sale.

Grain and hay raised after adjudication does not become a part of this estate.

Rev. on Bank, Sec. 113.

ORDER.

It is therefore ordered that the claim of the Bank of Nezperce be disallowed and the costs of this hearing be taxed in favor of the bankrupt and against the Bank of Nez Perce.

That the sale of the homestead be not confirmed:

That the accounting of the trustee be allowed in the sum of $349.95.

That the bankrupt pay to the Trustee within 30 days from the date of the filing of this order the sum of all allowed claims in the sum of $258.50; the sum of the expenses of the administration of the estate by the trustee as aforesaid in the sum of $349.95; the sum of $5.83 Commissions of Referee and filing fee on 13 claims and the sum of $17.28 Commissions of Trustee making a total of $631.56 and the bankrupt is hereby empowered and authorized to execute and deliver a mortgage on said homestead for the purpose of securing said sum if necessary.

That if for any reason the bankrupt fail or refuse to pay said sum to the trustee that the trustee sell said homestead to the highest bidder according to law and make return of said sale to the Court and upon confirmation thereof pay to the bankrupt and his wife the sum of $5,000.00 and deposit the balance in the Ilo State Bank subject to the further orders of the court.

That if the bankrupt pay said sum of $631.56 to the Trustee that the Trustee report the same to the Referee and deposit the same in the Ilo State Bank subject to the order of distribution of the same which order the Referee will make when such report is made.

Witness my hand at Ilo this 12th day of April, 1914.

G. ORR McMINIMY,
Referee in Bankruptcy.

Trans. pp. 19 to 35, inclusive.

When bankrupt first made his schedules, he talked with Mr. McDonald, his attorney, about scheduling a set-off against bank's judgment, and the attorney advised him that that was an after consideration and could be done later. Trans. p. 65 and 66.

At the trial, the Referee permitted amendment of schedules. Trans. p. 59.

Not later than the second day after bankrupt returned from penitentiary, he went to the bank at Nez Perce and had a conversation with Mr. Dowd, the cashier. Trans. p. 59.

"The conversation was in Mr. Dowd's office in the Bank of Nez Perce and I asked him what his idea was for protesting against my pardon and he said it was the advice of his attorney. He thought he would make the old woman "dig up." He knew it wasn't right, but that was the advice of his attorney, Mr. O'Neil,

and I asked him what they had done with the property that he had written to me that they had attached and he said he didn't know where it was or anything about it, and I said to him, now Mr. Dowd you get in and be a man and I will show you that I am a man, and he said he could do nothing. Everything was left to his attorney." Trans. p. 59 and 60.

Here, on the very second day after arriving home from the penitentiary as a free man, the bankrupt demands of Mr. Dowd what they had done with the attached property and demanded an accounting but Mr. Dowd could do nothing because "everything was left to his attorney."

And, instead of treating justly with the bankrupt, the bank gets execution after execution and, finally thereby forces him into the Bankruptcy Court where it can get no execution with which to torment and harrass the bankrupt.

But, immediately, as found by Referee, however, the attorney for the bank directs the Trustee to seize the personal property of Mrs. Pendel. The persecution therefore took the form of directing the Trustee in tormenting the bankrupt's wife and forcing her to defend her own personal property.

On the 21st of March, 1913, the Judge of the United States District Court wrote to the Trustee that he could not advise him, but suggested the propriety of the Pendels securing the services of some attorney to

arrange a plan to get the conclusion, it seems as we must infer, desired by the Pendels. Trans. p. 62.

This letter to the Trustee proves conclusively that the Pendels were making demands on the Trustee, which should be settled and determined.

In February, 1913, the bankrupt saw Mr. Collins—the president of the bank—and demanded an accounting for the attached property but Mr. Collins, like Mr. Dowd, could do nothing. Trans. p. 60 and 61.

And, on March 1st, 1913, Mr. O'Neil filed a petition for an order of sale of the homestead and secured from the Referee an ex-parte order of sale. And, at this very moment, the claim of the bank against the estate was not allowed.

In 1909, before bankruptcy proceedings, the bankrupt demanded of Mr. Dowd an accounting for the attached property. In February, 1913, before the bank procured the ex-parte order of sale, the bankrupt demanded of Mr. Collins—the bank's president—an accounting for the attached property.

*Now, why did not the bank force action on the matter of the allowance of its claim*? And why did the Referee not allow its claim as proved by it when it was filed, or presented to him?

Remembering that bankrupt was demanding an accounting for the attached property, and reading

the facts found by the Referee, the answer to the two foregoing questions is very easy. *The fact must be inferred that the bankrupt was objecting to the trustee and to the referee from the first and continuously against the allowance of the bank's claim without first making it account for the attached property.*

And the trustee did nothing except to get an ex-parte order for the sale of the homestead and to sell it and report its sale and ask confirmation.

On the absolute failure of the Trustee to defend his estate against the bank, the Referee permitted the bankrupt to make the defense, and, at his own expense, in June, July, August, he presented to the Referee his defense against the bank's claim and against the confirmation of the sale of his homestead.

*The bankruptcy adjudication put the bankrupt under disability,* except only, as hereinafter proven by citation of law, he had a right to report to Trustee objections to allowance of claims as provided by section 57, Bankrupt Act, 1898.

It must be assumed that the Referee would not permit bankrupt to defend the estate against the bank until it was very plain that the Trustee would no do so.

*The bank and Trustee were under no disability and, at any time, after bank filed its claim either had*

*the absolute and unrestricted right to have a hearing before the Referee on the matter of the allowance of the claim.* The bank can blame no one for the delay. It, itself, is to blame. It labored under no disability as did the bankrupt.

But the district court seemingly puts the whole blame for there not being a hearing sooner upon the bankrupt, and seems to think that, because bankrupt did not sooner get a hearing, he had never, at any previous time, made known an objection to the allowance of the bank's claim to either the Trustee or Referee; *and the District Court presents the idea of the bankrupt bringing his defense from concealment at too late an hour.*

The order of sale recites that notice was given and a meeting of creditors. Trans. p. 69. But this must refer to notice of petition for order of sale filed in 1910 by Trustee and upon which the proceedings in No. 1999 in this court was had, which petition was filed in 1910 and meeting of creditors had in 1910. Trans. p. 31. And therefore does not refer to any notice of the petition filed on the 1st day of March, 1913. Trans. p. 81-82, on which order of sale was based. Trans. p. 23.

However, the United States court held that notice of the petition filed on the 1st day of March, was not necessary.

But this view omits the consideration of the increase in the value of the homestead; omits the consideration of the question that the United States court did not in its order of May, 1912, fix any terms of sale but remanded the case to Referee to proceed according to law to sell the homestead in case $4000.00 was not paid to Trustee within 30 days, and furthermore the order of the Honorable District Court of May, 1911, assumes that the bankrupt's estate owes the judgment of the Bank of Nez Perce, which is a very violent assumption in face of the facts found by the referee in the hearing on objections to allowance of that judgment as a claim against the estate and on objections to confirmation of sale, and on request to ascertain total liability of estate so that bankrupt could pay all in full. Trans. p. 19.

And furthermore at the time the exparte order was made or sale had the estate or homestead was worth from $14,000 to $15,000.00, when at time of order of May 20, 1911, the homestead was worth only $9000.00. Here is an increase in value of $6000.00; here is a changed condition.

And furthermore the order of sale was given and the order had at a time when the total liability of estate upon request of the bankrupt or of Mrs. Pendel

could be ascertained and fixed; for the time for filing claims had long before expired, and all the claims filed against the estate had not been allowed. Yet the Trustee pressed for sale of the homestead. Trans. p. 71. And did not defend the estate against the unjust claim of the Bank of Nez Perce. Trans. p. 31-31.

Mrs. Pendel has the right to object to allowance of the claim of Bank of Nez Perce, and nothing which the bankrupt or trustee could do could estop her. She had a right to object to the order of sale being made before allowance of claim of Bank of Nez Perce; she had a right to be heard as to terms of the order of sale. For she has a vested interest in the homestead.

The order of sale, however, was obtained upon the exparte petition though Referee wanted a notice and hearing. Trans. p. 31. And yet the Trustee has the impudence to insult the Referee in his petition for sale, Trans. pp. 11 and 12, by accusing Referee of holding off the sale so as to enable the bankrupt to get hay growing on the premises. This is done by this Trustee who in his report of sale attempts to reduce the bankrupts exemption just $1571.90 by taking all sorts of expenses out of it. Trans. p. 80, 79, 78, 77. This is done by a trustee who tries to take from bank-

rupt's exemption the expenses of unlawfully seizing and keeping Mrs. Pendel's personal property, trans. p. 22-76 which he seized without any authority from the referee and under direction of Mr. O'Neil—the attorney for Bank of Nez Perce, trans. p. 22. Consequently, the proceedings of such a trustee should be very carefully and closely investigated. And it should be remembered, too, that the Trustee had failed to defend the estate against the claim of the Bank of Nez Perce, trans. p. 30-31—bottom and top, and had pressed for six months to get a sale of bankrupt's homestead, trans. p. 71.

The order of sale contains no terms other than that no bid less than $5000.00 shall be considered by the Trustee. Trans p. 69-70. Probably, however, since the order does not specify terms of sale, the whole purchase price is ordered paid immediately to the Trustee.

The notice of sale fixes definite terms of sale, to-wit: Ten per cent of purchase price in cash at time of the sale; Ninety per cent of the purchase price at time of confirmation of sale. Trans. p. 83-84. Thus an indefinite credit is given on ninety per cent of the purchase price of the homestead. And no security required to insure the payment of the ninety per cent upon confirmation of the sale. But the District

Court says there is not necessarily conflict between order of sale and notice of sale. Trans. p. 46. And therefore dismisses the question.

The order of sale takes expenses out of the $5000.00 exemption, trans. p. 70, and therefore invites a report of sale for confirmation which attempts to take an enormous amount out of the exemption. Trans. p. 75 to 81.

So the bankrupt just had to object to confirmation of sale as reported by Trustee, in order to protect his rights under the law.

The bankrupt, on behalf of the estate and on his own behalf, seeks a review of the question of law to determine whether the orders of the Referee should stand upon the merits, or be modified or reversed because of error of law, committed by him.

The total liability of the estate was fixed by Referee at the sum of $631.56, and of this total liability, $258.50 is for claims filed and allowed by the referee. The difference, therefore, between $631.56 and $258.50, which is $373.06, is the total costs and expenses of administration fixed by the Referee.

The United States District Court, having reached the conclusion as matter of law, that the estate, as represented by the bankrupt, could not have relief on the merits, allowed the claim of the bank in the

total of $3294.53, and adding this to the $258.50, we have the total claim liability of the estate, as fixed by the United States District Court, in the sum $3553.03. But the United States District Court affirmed the sale to Mr. Collins and extended the privilege to the bankrupt or his wife to pay to the Trustee within 35 days the sum of $5500.00 with interest thereon at the rate of seven per cent from date of sale to Collins, making, practically, a total sum of $6000.00.

This requirement to pay $6000.00 to the Trustee is not justified since nothing appears showing any need for such an amount.

The questions to be reviewed are raised by the United States District Court decision and order on petitions to review the orders made by the Referee inasmuch as the Referee granted full relief and held with the estate, and ascertained the entire liability of the estate, allowed the estate's defenses on the merits, disallowed bank's claim, disaffirmed the sale and gave bankrupt 30 days within which to pay all liability of the estate. And these questions thus raised are presented in the assignment of error.

The total judgment of the Bank of Nez Perce including costs, and its date, are given by the United States District Court and the Referee as follows:

Date of Judgment Feb. 15th, 1909: Amount of judgment $3635.16; amount of costs $1747.12; total amount of judgment and costs $5382.28. Trans. p. 36.

So it was unnecessary to have the claim of the Bank of Nez Perce certified so as to know the total judgment and costs. The United States Court gives the amount realized on the execution sale which is $1956.25, and after application of this amount on the costs and judgment states the remainder which is $3427.93 and orders the amount realized from the sale on order of the court, which is $131.50, deducted from the remainder. Trans. p. 44. But United States District Court fails to order the $57.00, realized from sale of five hogs, deducted.

Now, Referee finds the value of the property when attached to be $6522.00 and that the total amount of this value which has been accounted for arises from the three sales—trans. p. 24—and adding the items at the amounts of $2000.00 and $57.00 and $131.50, we have the sum as stated of $2188.50, which deducted from the $6522.00 leaves $4333.50 unaccounted for by the bank. If the bank must apply this $4333.50 on the balance of its judgment above stated as a payment or if the bank must account for it, the bank's judgment can not be allowed as a claim against bankrupt's estate.

## ASSIGNMENT OF ERRORS.

The bankrupt assigns for himself and for his estate, that the District Court committed error in the following matter of law, to-wit:

First: Erred in each and every particular, severally and separately, stated in his petition for review by the United States Court of Appeals. See his petition for review. Trans. p. ————.

Second: Erred in holding that the bankrupt had committed such fraud on the Bankruptcy Court and the Bank of Nezperce in the matters referred to by the Honorable Judge of the District Court as to require the holding that the estate and the bankrupt could not have relief on the merits against the Bank of Nez Perce, and were thereby estopped to prove the facts upon which the relief on the merits depend.

Third: Erred in holding that all claims for wrongful attachment were merged in, or extinguished, by the judgment which the Bank of Nez Perce recovered in the state court against the bankrupt and his wife, erred in holding that such merger and extinguishment were effected by section 4185, Revised Codes of Idaho.

Fourth: Erred in holding that the rule established by the case of William vs. Friedman, 4 Idaho, 209, merged and extinguished all claims for wrongful at-

tachment in the judgment recovered by the bank in the state court.

Fifth: Erred in holding that the sales on process of the attached property, including the execution sale on the 6th of April, 1909, were valid and legal.

Sixth: Erred in holding that section 4055, Revised Codes of Idaho, relieved the bank of all liability to the estate on the merits, on the ground that all action for relief on the part ofthebank against the sheriff and his bondsmen was barred by section 4055, supra.

Seventh: Erred in holding that the bank was released from all liability to the estate on the merits, on the ground that an action by the Trustee, commenced at the time the referee heard evidence on the objections to the allowance of the judgment against the estate as a claim to be paid in due course of administration, was barred by section 4054, Revised Codes of Idaho.

Eighth: Erred in holding that the matters found by the Referee were not set-offs in favor of the estate within section 68 of the Bankruptcy Act of 1898, and therefore cannot be used to set-off against the judgment of the bank.

Ninth: Erred in holding in effect that the estate and the bankrupt could not have it decreed upon the

facts that the judgment was paid and satisfied to the extent of the value of the property taken on attachment and execution, which payment, of course would be of date of April 6, 1909, the date of the execution sale.

Tenth: Erred in holding that the estate and the bankrupt were guilty of such lashes that they could not have the relief sought on the merits.

Eleventh: Erred in allowing the judgment of the bank in any amount as a claim against the estate.

Twelfth: Erred in allowing the judgment as a claim against the estate in the amount for which it was filed, less $131.50.

Thirteenth: Erred in not disallowing the judgment against the estate as a claim to be paid in due course of administration; erred in reversing the order of the Referee disallowing the claim of the bank against the estate.

Fourteenth: Erred in affirming the sale of the homestead to Mr. Collins—the purchaser.

Fifteenth: Erred in fixing $5500.00 and interest thereon at the rate of seven per cent as the amount which the bankrupt or his wife might pay to the Trustee within 35 days and thereby redeem the homestead from bankruptcy administration; the amount to be paid in is large and not needed for payment in

full of all liability of the estate; erred in not giving a greater period than 35 days for redemption of homestead from bankruptcy administration.

Sixteenth: Erred in not fixing the amount of costs and expenses of administration, so that the bankrupt or his wife might pay them in full; erred in leaving the costs and expenses of administration open to future litigation and the expense of future litigation.

Seventeenth: Erred in holding that the bankrupt had no right to defend his estate and himself against the allowance of the bank, and had no right to any credit or payment on the judgment except only $131.50 in addition to amount gotten on the execution sale on the 6th of April, 1909.

Eighteenth: Erred in holding that because of the rules of law adopted by the Honorable District Judge the bankrupt had no right to defend himself and his estate, and show that neither he nor his estate owed, or owes, the bank one cent.

The foregoing errors must be taken as error committed against the estate, against the bankrupt and against the bankrupt's wife, and considered as errors assigned by the bankdupt for the benefit of himself, his estate and the benefit also of his wife. He has a right to thus assign errors because, in so far as concerns the controversy over the allowance of the bank's

claim against the estate, he represents the estate as well as himself; he represents the estate, simply because, by permission of the Referee, he makes the defense which the Trustee should make and he is making that defense for the Trustee as well as for himself.

Each error assigned will not be considered separately, or severally, for the reason that each error is so related to every other error which is assigned that an argument on them, considered collectively, will be clearer and much more desirable, and far the best and most convincing presentation of the errors assigned. So we argue all of them and claim relief because of each error assigned.

## JURISDICTION OF THE COURT.

The Honorable United States Court of Appeals has decided that all questions of law as to a creditor's claim can be decided on review under subdivision b of section 24 though there can be an appeal taken from the allowance or disallowance of the claim under either sections of the Bankruptcy Act, and that an appeal will be considered as an application for revision under section 24 b. supra.

In re Williams Estate, 140 Fed. 710, (C. C. A. 9th Circuit).

In this connection, it must be noted that the disallowance of the claim of the bank by the Referee was made upon a record mixed with other matters from which no appeal lies at all under the Bankruptcy Act, and the allowance of the claim by the District Court was also mixed with other matters which can not be appealed from. That part of the review which relates to the claim of the bank is exclusively upon matters of law, and no question of fact to be reviewed, at all. The Honorable District Judge found no facts contrary to the facts found by the Referee. And it is exclusively a question of law as follows: *Can relief be given to the estate and thebankrupt upon the merits, and upon the facts found by the Referee, in so far as concerns the allowance or disallowance of the bank's claim*?

All the other questions, raised by the bankrupt's petition for review, can, under the Bankruptcy Act, be presented in no other way, and not by appeal.

## IDAHO STATUTE.

The Idaho statutes involved on this review are as follows:

Sec. 4050. The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:

Sec. 4055. Within two years: An action against a sheriff, coroner, or constable, upon the liability incurred by the doing of an act in his official capacity, and in virtue of his office, including non-payment of money collected upon execution.

Section 4054. Within three years: An action for trespass upon real property. An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property.

Section 4070. If a person entitled to bring an action, other than for the recovery of real property, be, at the time the cause of action accrued, imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than for life; The time of such disability is not a part of the time limited for the commencement of the action.

Section 4185. If the defendant omits to set up a counter claim in the cases mentioned in the first subdivision of the last section, neither he nor his assignee can afterward maintain an action against the plaintiff therefor.

The section, referred to in section 4185, is section 4184, which is as follows: The counter claim mentioned in the last section must be one existing in favor of a defendant and against a plaintiff, between

whom a several judgment might be had in the action, and arising out of one of the following causes of action:

1. A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action;

2. In an action arising upon contract; any other cause of action also arising upon contract and existing at the commencement of the action.

The section referred to in section 4184, is section 4183, which is as follows. The answer of the defendant shall contain:

1. A general or specific denial of the material allegations of the complaint controverted by the defendant;

2. A statement of any new matter constituting a defense or counted claim. If the complaint be verified, the denial of each allegation controverted must be specific, and be made positively, or according to the information or belief of defendant. If the defendant has no information or belief upon the subject to enable him to answer an allegation of the complaint, he may so state in his answer, and place his denial on the ground. If the complaint be not veri-

fied a general denial is sufficient, but only puts in issue the material allegtions of the complaint.

The Idaho statute which is construed in the case of Willman vs. Friedman, 4 Idaho, 209, and referred to by the District Court on page 40 of the transcript, is as follows, and is section 4188 of the Codes of Idaho: "Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract or transaction upon which the action is brought, *or affecting the property to which the action relates*, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint. The cross complaint must be served upon the parties affected thereby, and such parties may demur or answer thereto as to the original complaint.

Section 2047. Notwithstanding the election and qualification of a new sheriff, the former sheriff must return all process and orders before and after judgment, which he has fully executed, and must complete the execution of all final process which he has begun to execute previous to the expiration of his term of office.

COMMENT ON THE STATUTES.

Willman vs. Friedman, supra, says nothing about section 4185, supra, and does not pretend to construe it. The claim for damages on account of a wrongful attachment was presented in the Willman case by cross complaint and not by answer under sections 4184 and 4183, supra. The damages arose out of the action which affected the property which was attached and did not arise out of the cause of action contained in the complaint, or the transaction set forth in the complaint, which was simply the note transaction, and nothing more, and therefore these damages for wrongful attachment could not be claimed under sections 4183 and 4184, supra, but must be claimed exclusively under section 4188 under that provision which authorizes the filing of a cross complaint because the action affected the property attached and not because the damages arose out of the note transaction, or cause of action set forth in the complaint. *The difference is marked and distinct.*

If section 4055, supra, bars a cause of action against the attaching plaintiff, then the attachment defendant has not three years under section 4054, supra, within which to commence an action against the attaching plaintiff, but must commence such action within two years under section 4055. This

observation reveals the false reasoning of the learned District Judge in his discussion of section 4055, supra, and shows that section 4055 has nothing to do with the question before the court.

The objections to the allowance of a claim which objections are authorized by the Bankrupt Act is not the commencement of an action under section 4054, supra, or section 4055, supra. *Each claim against the bankrupt's estate at the time of the bankruptcy adjudication is burdened with all set-offs or objections to its allowance, and the fact that the trial on the allowance of the claim was delayed can not release such claim from the burdens on it at the time of the adjudication of bankruptcy; consequently, a state* statute of limitation cannot run against the estate's objections or set-offs after adjudication of bankruptcy. *If such statutes did, the result would be a preference of a creditor of the estate.*

When a sheriff has destroyed property of a defendant debtor while holding it under attachment and execution, the payment to the extent of the value of the property injured or destroyed, or the cause of action against the judgment plaintiff does not accrue until the execution sale as will be hereinafter demonstrated.

Section 2047, supra, will also be hereinafter presented to the court on the question of the right of an ex-sheriff to sell at execution sale attached property on an execution issued after he ceased to be a sheriff.

## POINTS

Point 1. The bankrupt had a right to object to allowance of bank's claim. He was under disability after bankruptcy adjudication. He could not estop his estate. He could only defend his estate by permission of bankruptcy court. Claims when filed are burdened with all of estate's defenses. Statutes of limitation do not run against defenses of estate to allowance of claims after bankruptcy adjudication. The Bankruptcy Act requires no formal written objections to allowance of claims. The estate had a right to all its defenses against the allowance of bank's claim at the time of the trial in 1913. And state statutes of limitation did not run against estate's defenses.

## AUTHORITY UNDER POINT 1.

"The better rule seems to be that where defendant's claim in set-off was an existing debt not barred by the statute of limitations at the time plaintiff's

action was begun, it will be a valid set-off, although the statutory period may have elapsed before filing of the answer setting it up."

25 Cyc. 1312;

McDougal vs. Hulet, 132 Cal. 154;

Perkins vs. West Coast Lumber Co., 120 Cal. 27;

Camp vs. Gullett, 7 Ark. 524;

Eva vs. Louis, 91 Ind. 457;

Parker vs. Sanborn, 7 Gray, 191;

Hobert vs. Day, 33 Hun. 461;

Brumble vs. Brown, 71 N. C., 513;

McEwing vs. James, 36 Ohio St., 152;

Paduch, Etc. R. Co. vs. Parks, 86 Tenn. 554;

Williams vs. Lenon, 8 Baxt. 395;

Crook vs. McGreal, 3 Tex. 487;

Walker vs. Fearhake, 22 Tex. Civ. App. 61,

Walker vs. Clements, 15 Q. B. 1046.

The principle above stated as to set-offs not becoming barred after commencement of an action applies to damages for a tort or negligence.

Perkins vs. West Coast Lumber Co., supra.

The filing of the claim against the estate, certainly, is equivalent to the commencement of an action in a state court.

Again, all causes of action against the bankrupt which were not barred by a state statute at the date

of the bankruptcy adjudication cannot subsequently bar such causes of action against the estate if the claims and proof therefor have been filed in time, and if claims and proof are not filed in time only the Bankruptcy Act forbids their allowance against estate.

In re Wright, 6 Bliss. (U. S.) 30 Fed. Cas. No. 18,068;

In re Eldridge, 2 Hughes (U. S.) 256, 8 Fed. Cas. No. 4331;

Wolferd vs. Unger, 53 Tex. 634.

If the state statutes will not run against the causes of action of the creditors as claims against the estate subsequent to bankruptcy adjudication, it seems unreasonable to hold that the state statutes run against causes of action in favor of the estate so as to bar them as set offs against claims filed against the estate.

Statutes of limitation never run against pure defenses to a cause of action.

25 Cyc. 1063, O.

The statutes of Limitation never apply to plea in bar alleging payment.

25 Cyc. 1063, O.;

Blackshear vs. Dekle, 120 Ga. 766;

Grover vs. Tingle, 21 Ky. L. Rep. 885;

King vs. King, 9 N. J. Eq. 44;

Compty vs. Aiken, 2 Bay, 481, (S. Car.);

Tinkham vs. Smith, 56 Vt. 187.

"The defense of reduction or recoupment which arises out of the same transaction as the claim survives as long as the cause of action upon the claim exists, although an affirmative action upon the subject of it may be barred by the statute of limitation."

25 Cyc. 1063;

Grant vs. Burr, 54 Cal. 298;

Conner vs. Smith, 88 Ala. 300;

Becker vs. Baldwin, 55 Conn. 419;

Brown vs. Miller, 38 Ill., App. 262;

Sherman vs. Sherman, 36 Ill. App. 482;

Morris vs. Hulme, 71 Kans. 628;

Lastrapes vs. Rocquet, 23 La Ann. 68;

Nicholas vs. Hause, 2 La. 382;

Bushnell vs. Brown (La.), 4 Mart. N. S., 499;

Davenport vs. Fortier (La.), 3 Mart. N. S. 695;

Thompson vs. Milburn (La.), 1 Mart. N. S. 468;

Aultman vs. Toney, 55 Minn. 492;

Feld vs. Coleman, 72 Miss. 545;

Welch vs. Usher, Riley, Eq. 121;

Rosborough vs. Picton, 12 Tex. Civ. App. 113;

Williams vs. Neely, 134 Fed. 1, 67 C. C. A. 171;

Ord vs. Ruspine, 2 Esp. 569.

The payment, or set-off, claimed by the bankrupt's estate accrued on the 6th of April, 1909. The defense grew out of the proceedings in the state court which culminated in a judgment on the 15th of February, 1909, and in an execution sale on the 6th of April, 1909. Therefore, so long as the right exists to sue on the judgment, the right to defend against the judgment for damages which grew out of the wrongful attachment, out of the waste and destruction of the property and the execution sale, must also exist and cannot be barred by a statute of limitation. This right which grew out of the wrongful attachment, out of the waste and destruction of the property and out of the execution is a cross-demand against the bank, accruing on the 6th of April, 1909, for $4333.50.

"When cross demands have existed between persons under such circumstances that, if one had brought an action against the other, a counter claim could have been set up, the two demands shall be deemed compensated, so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or death of the other."

Section 4186, Revised Codes of Idaho.

So, if the bank had commenced an action on its judgment for balance after applying $2188.50 there-

on, the bankrupt could have set up his cross-demand in the sum of $4333.50, and the bank could get no new judgment against him in the state courts.

If he could do this in the state courts, it would seem, indeed, that the bank can not relieve its judgment of the estate's cross-demand for $4333.50.

*The judgment when filed against the estate was burdened with this cross-demand whether it be considered as a payment or simply as a set-off within the meaning of subdivision A of section* 68, *Bankruptcy Act,* 1898.

By scheduling the judgment as unpaid and by failing, at first, to schedule the cross-demand can not take the judgment from under the burden of *the cross-demand in favor of the estate.*

To hold that the judgment can be thus released from the burden of the cross-demand in favor of the estate is to hold that a bankrupt can prefer a creditor by failing to schedule at first the cross-demands against the judgment scheduled as unpaid, and thereby give the right to such judgment debtor to collect the judgment the second time from the property of the bankrupt.

To hold that sections 4055 and 4054, Revised Codes of Idaho, release the judgment from the burden of the estate's cross-demand is to permit those sections

to give a preference to the bank and to give the bank the right to collect its judgment the second time from the property of the bankrupt.

The next thing to be done in tracing the authority is to understand the filing and proving a claim against the estate of a bankrupt and the manner of its allowance or disallowance.

The proof of claims against a bankrupt's estate must be a written statement under oath setting forth the claim, its consideration, payments made on it and "that the sum claimed is justly owing from the bankrupt to the creditor."

Sub-division A section 57, Bankrupt Act.

To ascertain whether the claim was "justly owing from the bankrupt to the creditor," *at the time proof of claim was filed, it there is* an objection on account of a set-off in favor of the estate, the Referee must ascertain the "mutual debts or mutual credits" existing between the claimant and the estate at the time proof of claim was filed or at time of the adjudication of bankruptcy.

Section 68, subdivision A, Bankrupt Act.

If no objection is made to, or no cause exists against the allowance of the claim as filed, the court must allow it when received or presented, but if

there is objection or cause, the Court can continue the matter of the allowance of the claim.

Subdivision d, section 57, Bankruptcy Act.

The objections shall be heard as soon as the "best interests of the estates and claimants will permit."

Subdivision f, section 57, Bankruptcy Act.

And claims which have been allowed "may be reconsidered for cause and reallowed or rejected in whole on in part, according to the equities of the case, before but not after the estate has been closed."

Subdivision k, section 57, Bankrupt Act.

Thus, therefore, it is seen that the time for making objection to a claim as proved by claimant extends from the day of filing the claim to the time when the estate is closed. And there is nothing in the Bankruptcy Act which requires the objection to be in writing or under oath, or even filed with the Referee or Court. So it may be orally made. *And, since the Referee did not allow the claim of the Bank of Nez Perce when the proof and it were received by, or presented to him, it must be conclusively presumed, when there is no evidence or fact to the contrary, that there was immediate objection to, or cause against its allowance under the proof filed.*

It is the duty of the bankrupt to examine "the correctness of all proofs of claims filed against his

estate," and, if to his knowledge any person has "proved a false claim against his estate, disclose that fact immediately to his trustee."

Subdivisions (3) and (7), Sec. 7, Bankrupt Act.

But he shall not be required to examine proofs of claims at a place more than one hundred miles from his home unless ordered to do so by thecourt.

Subdivision (9), Sec. 7, Bankrupt Act.

*Thus it clearly appears that the trial under section* 68, *Bankrupt Act, relates exclusively to the time when claimant filed his poof of claim or to the time of bankruptcy adjudication, for sole purpose* of ascertaining the "mutual debts or mutual credits" *as of that date and not as of date of trial or some other date.*

The claim of the Bank of Nez Perce as filed and when filed was *burdened with all objections to its allowance which then existed and any interested party had a right at any time before the estate was closed to insist upon these objections.*

The learned United States Court overlooked the truth last above stated and all the foregoing truths, and apparently assumed that *no real objections existed at the time bank filed its proof of claim* and that there was no real objections until the date of the trial before the Referee and that the claim of the

bank was not burdened, at the time it was filed, with these objections against its allowance as filed which were proven in June, July, and August, 1913.

The very fact that the Bank of Nez Perce did not force action of the court on the allowance of its claim proves conclusively that its claim, at all times from the day it was filed, was burdened with the defenses proven in 1913.

The "mutual credits" of section 68, Bankrupt Act, *are cross-demands,* existing, at time the bank filed its claim or at time of bankruptcy adjudication, between the bank and the bankrupt.

Of course, the defense of payment of judgment is also a defense which existed at the time the bank filed the proof of its claim; consequently, it, at once, must be noted that the state stautes cannot run against the defenses of the estate to the allowance of a claim as proved—that is cannot run after adjudication of bankruptcy—and can only run against the estate's right to bring actions in the state courts on causes of action which passed to the trustee upon bankruptcy adjudication. *The distinction is a very marked difference,* and shows how great an error the United States District Court made in not enforcing the distinction in the proceedings at bar.

When all the law cited under point 1 is applied to

the facts found by the Referee, it will be seen that the United States District Court erred in regard to laches fraud, estoppel and the statutes of limitation.

## POINT A.

The Bankruptcy Court has power to liquidate damages, and to set them off against demands on contract. Subdivision b of section 68 Bankruptcy Act does not refer to set-offs in favor of the estate.

## AUTHORITY UNDER POINT A.

The Referee under section 68 of the Bankruptcy Act of 1898 had the power and jurisdiction to liquidate unliquidated damages and to set-off enough of the amount against the judgment of the Bank of Nez Perce to satisfy it, and thereupon to disallow it.

In re Harper, 175, Fed. 412.

Subdivision b of section 68, supra, does not refer or apply to set-off in favor of the estate and against the estate's creditor.

In re Harper, supra.

Consequently, the set-off in favor of the estate does not have to be provable against the estate under section 63, Bankruptcy Act, 1898.

In re Harper, supra.

## POINT II.

The judgment of the bank was paid in full on the 6th of April, 1909.

## AUTHORITY UNDER POINT II.

Since the Bank of Nez Perce seized on writ of attachemnt on or about the 28th of June, 1908, and subsequently sold it either on order of sale or on execution as it claimed, personal property of the bankrupt of the value of $6522.00, the burden of proof was on the bank to prove that its judgment against the bankrupt for less than $6522.00 was not paid and satisfied in full, though not satisfied of record.

23 Cyc. 1488, F.

Where the sheriff on writ of attachment has seized property of the judgment debtor of the value of $6522.00 and claims to have sold it on order of sale and execution—except five of the attached hogs, which were sold by the parties for about $57.00—and only got for a part of the attached property, sold on order of court, the sum of $131.50, and for a part of the attached property, sold on execution, about $2000.00, making a total of $2188.50, leaving the sum of $4333.50 of the value unaccounted for, and the evidence shows that the sheriff and his keepers negligently wasted, destroyed and injured the prop-

erty, the presumption of law that a judgement against the owner of the attached property for less than $6522.00 and for more than $2188.50 is satisfied and paid becomes conclusive.

Freeman on Judgements, 2 Vol. 4th Ed. Section 475, pp. 819, 820, 817;

Campbell vs. Spence 4 Ala. 543; 39 Am. Dec. 301;

Harris vs. Evans, 81 Illinois, 419;

Hershaw vs. Merchant's Bank, (Miss.), 7 How. 386; 40 Am. Dec. 70;

People vs. Hopson, (N. Y.), 1 Den. 574;

Sewell vs. Morgan, (Tenn.), 2 Heisk. 672;

Harmon vs. State, 82 Ind. 197;

Peek vs. Tiffany, 2 N. Y. 451;

Pickens vs. Marlow, 2 Smedes & M. 428;

Ladd vs. Blunt, 4 Mass. 402;

Trenary vs. Cheever, 48 Illinois, 28.

Hoard vs. Wilcox, 47 Pa. St. 51;

Yourt vs. Hopkins, 24 Illinois 326;

Kendrick vs. Hull, 71 Mo. 570.

## POINT III.

The estate on the 9th of February, 1911, when the bank filed and proved its claim, and on February 14, 1910, had a set-off of $4,333. 50, which set-off accrued

in favor of bankrupt on the 6th of April, 1909, and not before.

AUTHORITY UNDER POINT III.

Where a judgment creditor wrongfully attaches personal property of the judgment debtor of the value of $6522.00, though there is no waste or destruction by the sheriff and he afterward sells a small part of the attached property on order of court for $131.50, and on the 6th of April, 1909, sells another part on execution for about $2000.00—the parties having previously sold five of the attached hogs at private sale for about $57.00—making in all the total sum of $2188.50 gotten for the attached property, leaving the sum of $4333.50 of the value unaccounted for to the judgment debtor, a cause of action accrues on the 6th of April, 1909, in favor of the judgment debtor against the judgment creditor for the sum of $4333.50, and jointly against the judgment creditor, the sheriff and his bondsmen.

Files vs. Davis, 119 Fed. 1002;

Ruthven vs. Beckwith, (Iowa), 45 N. W. 1073;

Empire Mill Co. vs. Lovell, (Iowa), 41 N. W. 583;

Mayer vs. Duke, (Tex.), 10 S. W. 565;

Blass vs. Lee, 55 Ark. 329; 18 S. W. 186;

Hundley vs. Chadwick, 109 Ala. 517; 19 So. 845;

Probable cause for suing out the attachment can not be shown in mitigation of actual damages.

Schofield vs. Territory, 9 N. M. 526, 56 Pac. 306.

The levy of execution immediately after dissolution of attachment is not matter in mitigation of damages caused by the wrongful attachment.

Miller vs. Baker, 79 S. W. 187.

The seizure of property which has been wrongfully attached subsequently on another writ of attachment or on writ of execution, and the application of the property so subsequently seized without the owner's consent, cannot be shown either in defense or in mitigation of damages for the wrongful attachment.

Tiffany vs. Lord, 65 N. Y. 310;

Wehle vs. Butler, 61 N. Y. 245;

Lyon vs. Yates, 52, Barb. (N. Y.), 237;

Otis vs. Jones, 21 Wend. (N. Y.), 394;

Hanmer vs. Wilsey, 17 Wend. (N. Y.) 91;

Geller vs. Rosenfeld, 139 App. Div. 289, 123 N. Y., Supp. 628;

Churchill vs. Abraham, 22 Illinois 456; 4 Cyc. 860, Notes 14 and 23.

In the case at bar, considering the fact of destruction, and waste of the property and injury to it, by

and through the negligence of the sheriff and his keepers, and that the attached property had a value of $6522.00 at the time it was attached, it is justice and equity to hold that the measure of damages is the difference between $6522.00 and the $2188.50, which is, as above stated, exactly $4333.50, and, if the judgment is to draw interest from the 6th of April, 1909, the $4333.50 should also draw interest from April 6th, 1909.

Excluding these damages in the sum of $4333.50, and not requiring the bank to credit the $57.00 on its judgment, which it secured from the private sale of the five hogs, the District Court orders the bank's judgment to be allowed against the estate in the sum of $3294.53, having ordered only a credit of $131.50 for the amount gotten on the attachment sale, and which the bank had not credited on the judgment. There is no reason for the United States District Court nor ordering the sum of $57.00 credited on the judgment, since the bank had never given credit therefor when it filed proof of its claim.

If the estate is given credit forthe$4333.50 in adjusting the account under section 68, Bankrupt Act, 1898, then, of course, the bank's claim is wiped out and should not be allowed. There will yet be a balance due the estate.

## POINT IV.

The reasons given by the United States District Court why the estate cannot have defense of payment and set-off are extremely technical. The estate has a right to have benefit of all defenses to allowance of claims so long as estate remains unclosed. No bankrupt by any act of his can deprive his estate of these defenses. Sections 4055 and 4054, Revised Codes of Idaho can not deprive estate of its defenses against allowance of claims. The omission of defenses of estate from schedules of bankrupt can not deprive estate of its defenses to allowance of claims nor can the scheduling of a judgment by bankrupt deprive estate of its defenses. Bankruptcy adjudication suspends all state statutes in so far as concerns allowance of claims.

## AUTHORITY UNDER POINT IV.

If the bank had done its duty, or if it had been diligent in the matter of having its claims allowed or disallowed, it could have had the matter heard long before its right of action, if it has any on account of it being blameless, which fact is not supported by anything, against the sheriff and his bondsmen was barred by section 4055, Revised Codes of Idaho, relied upon by the United States Court to free the bank from all liability to the bankrupt's estate.

And at any time Frank M. Pindel, after the cause of action accrued, could have sued either the bank alone, or the sheriff alone, or the sheriff and his bondsmen alone, or the bank and the sheriff jointly, and had he sued the sheriff and the bank as joint-tort-feasors, and had enforced the judgment exclusively against the bank, and made it pay all of it, the bank could not have had contribution from sheriff.

Forsythe vs. Los Angeles Ry. Co. (Cal.) 87 Pac. 24;

Fakes vs. Price, (Okla.) 89 Pac. 1123;

38 Cyc. 493 (1);

38 Cyc. 490, i, and notes 25 and 26;

38 Cyc. 2055, b, 2057, e;

4 Cyc. 831;

38 Cyc. 2041, e.

So it is seen that the bankrupt could have elected to sue the bank alone; if the bankrupt had this right, the right passed to the estate and, as a set-off, no statute of limitation run against it, and certainly not sections 4055 and 4054, of Revised Codes of Idaho.

And his right to sue the bank did not depend upon the right of the bank to sue, and recover from, the sheriff and his bondsmen; yet, the United States Court, by his idea as to section 4055, Revised Codes of Idaho, holds that the estate can not have credit

under section 68, Bankrupt Act, 1898, for $4333.50 damages against the judgment of the bank, filed as a claim against the estate, simply because all right of action of the bank against the sheriff and his bondsmen, is barred by section 4055, supra.

*This is a new and strange proposition with no authirity to support it.*

Now, we come to the proposition that the estate cannot have credit for the $4333.50 under section 68, Bankrupt Act, simply because a plenary action commenced by the Trustee at the time of the trial before the Referee was barred by section 4054, Revised Codes of Idaho. *See authority under point* 1.

A bankrupt, or any creditor, as before stated, has a right to object to the allowance of a claim so long as the estate is unclosed.

Sec. 7, BaBnkruptcy Act, sub-divisions (3), (6), (7) and (9);

Sec. 57 Bankruptcy Act, sub-divisions, d and k;

Atkins vs. Wilcox, 105 Fed. 595; 44 C. C. A., 625; 53, L. R. A., 118;

In re Summer, 101 Fed. 224;
4 Cyc. 333, F.

The adjudication of bankruptcy suspends all state statutes of limitation in so far as concerns the allowance of claims under section 68, Bankrupt Act, 1898. And any claim against the estate which was not

barred at the time of the adjudication of bankruptcy will never be barred as a claim against the estate by any statute or United States statute, since such statutes do not run against it as a claim against the estate.

In re Wright, 6 Bliss. (U. S.) 30 Fed. Cas. No. 18068;

In re Eldridge, 2 Hughes (U. S.) 256, 8 Fed. Cas. No. 4331;

Wolford vs. Unger, 53 Tex. 634.

Where a bankrupt has scheduled barred debts, this act does not revive them and make them payable against the estate.

In re Lipman, 94 Fed. 353, 2 Am. Bankr. Rep. 46;

In re Rester, 2 Am. Bankr, Rep. 166, 95 Fed. 804;

It certainly must be true that if the bankrupt schedules a judgment which has been paid as an unpaid debt he cannot thereby make it an unpaid debt.

To get the benefit of unliquidated damages for tort of a creditor of the estate as a set-off under section 68, Bankrupt Act, the estate does not have to commence an action in the state or United States Courts, but the Rerefee under section 68, supra, can liquidate such claim of the estate for the purpose of setting it off against the estate's creditor's claim.

In re Harper, supra.

Consequently, as a claim against the estate, the judgment of the bank on adjudication of bankruptcy was burdened by section 68, Bankrupt Act, then and there, with the claim of the estate against the bank, and that burden became inseparable from the claim of the bank, and the claim of the bank, when filed as a claim against the estate, was, then and there, burdened with the claim of the estate against the bank, and that burden remained on the claim continuously so far as concerns its allowance by the Referee and the Bankruptcy Courts, and it could not be allowed with that burden on it.

In re Gerson, 105 Fed. 893, 5 Am. Bankr, Rep. 850.

This thought shows that no objection, formally made, was required to be made by any one prior to the expiration of the period within which the Trustee had a right to sue the bank in the state courts to keep the state statute from barring the claim of the estate as a set-off under section 68, Bankruptcy Act. *This reasoning is true, and cannot be refuted.* For the filing of the judgment against the estate as a claim to be allowed commenced the proceedings for its allowance under section 68, Bankrupt Act, and the bankrupt was not required to file written objections in any certain time thereafter to its allowance.

It, as already stated, was merely his duty to inform

the trustee of objections to the allowance of the claim, and to examine the correctness of "all proofs of claims filed against his estate" and when any person filed a false claim against his estate to "disclose that fact immediately to his trustee."

Sec. 7 Bankruptcy Act, subdivisions, (3), (7), (9).

Now, as already stated, the claimant must prepare and file certain proofs; he must give credit for all payments which have been made on the claim, stating the payments and he must show that the claim is justly owing by the bankrupt to him.

Section 57, Bankrupt Act.

The claim of the bank is false, if the facts are given force and effect which were proved before the Referee and found by him, and it should never have been allowed by him. The claims filed, as already stated, shall be allowed upon receipt by or upon presentation to the court" unless objection to their allowance shall be made by the parties in interest, or their consideration be continued for cause by the court upon its own motion."

Section 57, supra, sub-division d, thereof.

Now, there is a presumption that courts do their duty; consequently, if nothing appears to the contrary, it must be presumed that the referee did not allow the claim when he received it, or when it was

presented to him by the bank simply because objections had been made to its allowance, or for "cause" he continued its consideration. No one can read the facts he found upon the hearing in June, July and August, 1913, and conclude that he did not have "cause" for not allowing the claim when it was filed or that there had been no objections made to the allowance of the claim.

The bank, as already stated, had a right to force a hearing on the allowance of its claim at any time.

Section 57, supra, subdivision f thereof.

Even, as hereinbefore stated, after the claim has been allowed it may, at any time, before the estate is closed, be "reconsidered" and "reallowed or rejected in whole or in part, according to the equities of the case."

Section 57, sub-division k thereof.

Here, we have the proposition of doing equity in the matter of the allowance of claims against the estate. It certainly is not equity to make the estate pay the claim of the bank when the estate has a claim of $4333.50 against the bank, which under authority already cited may be considered as a payment on the judgment of the bank.

An examination of the whole Bankruptcy Act, we confidently believe, will not disclose a limitation on

the right of any interested party to make objections to allowance of claims after they are filed, or that they must make such objections within any certain time prior to the closing of the estate, or that the objections shall be filed in writing with the Referee. Certainly section 57, supra, of the Bankruptcy Act, does not require the bankrupt to file written objections with the Referee, nor does that section put upon him the burden of bringing the issues on the allowance of claims to a trial; *that section, however, puts upon him the duty of seeing that no false claims are allowed against his estate.*

He has been compelled in the proceedings at bar by the inaction of the Trustee and the activity of the Trustee to get his homestead sold and the sale confirmed without having the issues as to the claim of the bank settled to appear and get permission of the Referee to defend his estate; and he has been expending his own money in this defense.

*For doing this, the learned District Court has criticised him very severely, indeed.*

We are persuaded to believe that the attorney, who prepared his schedules for him, considered that he had a right under section 57, Bankruptcy Act, to state his objections to the allowance of the claim of the Bank of Nez Perce to the Trustee or to the Ref-

eree, and, therefore, that may be the way it was thought the matter should be handled.

Indeed, in view of the facts found by the Referee and in view of the law cited herein, it was a very great difficulty to determine whether the defense to the allowance of the claim was payment or set off. The attorney could not have the bankrupt schedule the judgment as a paid judgment, and expect notice to be sent to the bank under the Bankruptcy law; therefore, he certainly considered that he should have the bankrupt schedule it as a debt of the estate, since it was unsatisfied of record, and therefore necessary to treat it as an unsatisfied judgment to force the bank to file it against the estate and thereby present the controversy for settlement by the Bankruptcy Court.

We believe confidently that, under the authority, the real question presented to the court, upon the facts, is the question of payment of the judgment, rather than the question of set-off.

Yet, we have not felt it safe to present the case entirely upon that theory, since the defense of payment and set-off are, not inconsistent and both depend upon facts which do not exclude the other as a defense. *See authority under point* 1 *as to statute of limitations.*

## POINT V.

The taking of the property by the bank for the purpose of applying it on the debt owed by the bankrupt may be treated as a tort, but since there was a wrongful taking followed by waste and destruction and an execution sale, the tort can be waived and the recovery had as upon an implied promise to pay the reasonable value of the property—there being a payment on the reasonable value of $2188.50.

## AUTHORITY UNDER POINT V.

It sometimes happens that a tort can be waived and the recovery had for the reasonable value of the property as upon an implied contract to pay the reasonable value.

Cushman vs. Jewell, 7 Hun. (N. Y.), 525;

Tyson vs. Baker, 7 Lans. 511;

Lythgoe vs. Vernon, 7 H. and N. 180;

Brown vs. Sparrow, 7 B. and C. 310;

Hawk vs. Thorn, 54 Barb. 164;

Cooper vs. Shepherd, 3 C. B. 266;

Foreman vs. Nielson, 2 Rich. Eq. (S. C.) 287;

Goss vs. Mather, 2 Lans. (N. Y.), 283;

Willington vs. Drew, 16 Me. 51;

Gilman vs. Ware, 19 Ala. 252;

Firemen's Insurance Co. vs. Cochran, 27 Ala. 228.

So the $4333.50 may justly be considered and held to be the balance of a demand against the bank based upon the implied promise to pay the reasonable value of the attached property, having already paid on this implied promise to pay $6522.00 the sum of $2188.50 by applying it on the judgment recovered by the bank against the bankruptcy and his wife.

Consequently, for the purpose of set-off against the bank's judgment, the question of tort may be eliminated and let the inquiry proceed on the theory that the law raises the implied promise of the bank by and from the acts of itself and the sheriff, its agent, to pay bankrupt the reasonable value of his property, since it was wrongfully taken, wasted, destroyed and injured.

In re Hinschman, 104 Fed. 69;
4 Am. Bankr. Rep. 715.

The presumption of payment and satisfaction of the judgment to the extent of value of property wasted, destroyed, or injured, by the sheriff, must rest upon the principle enforced in the cases authorizing recovery as upon an implied promise.

## POINT VI.

Notice should have been given to Mrs. Pindel of petition for order of sale, and also to creditors. The

bank's claim should have been allowed or disallowed before order of sale, since subsequent to bankruptcy adjudication the estate had become solvent, and since the year for filing claims had long before expired. The bankrupt and his wife, since the estate had become solvent, should have been given an opportunity to pay the entire estate's liability before a sale was ordered. And neither the bankrupt or his wife could pay estate's entire liability until it was ascertained and fixed by the court. Since the Bank of Nez Perce and Trustee forced the sale without first forcing action on the bank's claim, since the purchaser is the bank's president, and since the homestead sold for only $10,500.00 when it was worth $15,000.00, the sale should be disaffirmed, and bankrupt be permitted to pay in full.

AUTHORITY UNDER POINT VI.

Mrs. Pindel was interested in the homestead. The husband has a vested interest in a homestead, taken from the separate property of his wife.

Blood vs. Munn, (Cal.) 100 Pac. 694.

She, therefore, was entitled to notice of the time and place of hearing the petition on which the exparte order of sale was made, and, not having had such notice, her property is taken from her without

due process of law if the sale of her homestead to Mr. Collins be confirmed.

"The power of the trustee to sell and convey the bankrupt's estate depends wholly upon statute, and a sale in any other manner than as therein prescribed would be a nullity."

Black on Bankruptcy, p. 160.

The application to sell is made by petition, and Referee sets a day and place for hearing the petition and must give ten days' notice to creditors as required by the Bankruptcy Act, and evidence for and against the proposed sale may be received.

Loveland on Bankruptcy, pp. 570-571.

If Mrs. Pindel had been notified before the order of sale was made, no doubt but that she would have demanded the settlement of the controversy as to the allowance of the claim of the Bank of Nez Perce, and would have offered to pay all liability of the estate in full as soon as it was ascertained. She had a right to make this defense to the granting of the order of sale. She was not given the opportunity; therefore, is not the sale to Mr. Collins absolutely void?

The bankrupt himself has appeared in opposition to the confirmation of the sale, and, whenever the total liability of the estate is ascertained, he offers to pay it in full to the trustee, and, to show his equity

to do as he offers, he has shown by witnesses, other than himself, that his homestead's value has increased to $15,000.00.

"The contest, with reference to validity of a sale, is usually made at the time of the application to the court to confirm the sale. The court may refuse to confirm the sale for mere inadequacy of price. It is not necessary that there should be fraud or even gross inadequacy of price as to be evidence of fraud."

"The court of bankruptcy has power, in its discretion, to set aside a sale even where such sale has been consumated by delivery of deed. In case money has been deposited or paid, it should be ordered to be returned by the trustee. Thus a sale may be set aside on the ground of fraud or collusion, or because the sale is illegal, as in not selling to the highest bidder, or selling property unlawfully in the possession of the Trustee, or made under an illegal or irregular order. Sales have also been set aside for mere inadequacy of price."

Loveland on Bankruptcy, pp. 579-580.

In connection with the subject under consideration, it is to be noted that, if the sale had been confirmed and the bankrupt had not appeared against the confirmation of sale and asked the trial of the controversy over the claim of the bank, not one dollar of the $10,500.00 could have been ordered paid on the claim of the bank so long as it was not allowed as a claim against the estate.

Then why did not the bank press the matter of the allowance of its claim first and thereafter demand,

in conjunction with Trustee, the sale of the property, if it's claim was allowed? This question may also be put to the trustee.

A reasonable answer to the question is as follows: Both the bank and Trustee were afraid of the reasons that had so long postponed the allowance of the bank's claim wiping out the claim, and evidently they considered that an advantage would be secured by first forcing the sale of the homestead and thereafter pressing the matter of the allowance of the claim to a conclusion.

Both the Trustee and the bank knew, so long as the controversy as to bank's claim was unsettled and undecided, that neither the bankrupt nor his wife could and would pay it and the bona fide liabilities of the estate to prevent the sale of the homestead, and seemingly it was thought best to so manage the affairs as the get bankrupt's homestead at a reduced price, and then, there would be from four to five thousand dollars profit on the sale, and the bank would still be the gainer, though its claim was thereafter disallowed on a final hearing.

The bank may attempt to answer this suggestion by citing the order of May 20, 1911, which the learned United States District Court says was made on the assumption that the estate owed the judgment to the

Bank of Nez Perce. But that assumption never allowed the claim of the Bank of Nez Perce against the estate, nor did it cut off the right of the bankrupt or of his wife to object to the allowance of the claim which bank filed against the estate.

The claim is not finally allowed before the close of the estate. For the allowance may be reopened and the claim rejected in whole or in part, as already stated, at any time before the estate is closed.

Sec. 57 Bankruptcy Act, subdivision k.

The claim was not filed until long after the institution of the proceedings, resulting in the order of May 20th, 1911. And that was not a final order. If the subsequent increase in the value of the homestead was so great as to make the estate solvent even though it owes to the bank $3294.53 allowed by the United States District Court, the claim should have been adjudicated before the sale of the homestead so as to give bankrupt or his wife an opportunity to pay all debts of estate, or to deposit with Referee an estimated amount, deemed sufficient to cover all liability.

The order of sale states no terms of sale; therefore, the terms must be held to be cash. But the notice gives terms of sale as follows: Ten per cent cash and 90 per cent on credit and giving until final

confirmation to pay the 90 per cent. If, therefore, the 90 per cent be not paid on final confirmation, the Trustee would have had to sue purchaser. There was no security required for payment of the 90 per cent. The ten per cent was not enough to amount to the $5000, or homestead exemption. And Trustee had to have cash in hand to pay this exemption to bankrupt. Trustee could not force bankrupt to take chances on this $5000.00 nor make him wait until settlement of a dispute which might arise over confirmation of sale.

The order invited litigation over confirmation of sale by directing certain expenses to be taken from the $5000.00 exemption. This would chill the bidding at the sale. The Trustee shows his unfairness by attempting to take a great sum of money from bankrupt's exemption of $5000.00, making it necessary for bankrupt to contest the report and thereby resulting in extending the time for payment of the 90 per cent credit. The purchaser has had over a year within which to pay 90 per cent of his purchase price. So it must be held that the part of the order of sale requiring these expenses to be deducted from the $5000.00 exemption is prejudicial since its purpose seems to be to rob the bankrupt and, at the same time, to indefinitely prolong the period of credit on the 90 per cent of the purchase.

In this connection, it is well to remember that the value of the homestead has been rapidly increasing and that therefore it is neither just nor right to get an order of sale which invites a report of sale that must result in objection to its confirmation and a procedure on sale which seemingly was intended to prolong the period of credit. For the Trustee knew that the bankrupt would not fail to object to a sale which would rob him of a great part of his exemption if the report of sale was confirmed as reported by Trustee.

Such an unfair and unjust sale should not be confirmed by the court.

That $5000.00 of the purchase price must be cash at time of sale, we cite:

Wood vs. Wheeler, 11 Tex. 122.

## POINT VII.

The execution sale on the 6th of April, 1909, was absolutely void.

Section 2047, Revised Codes of Idaho;

Fletcher vs. Morrel. (Mch.), 44 N. W. 133;

Kent vs. Roberts, 14 Fed. Cas. No. 7, 713;
2 Story, 591;

35 Cyc. 1543-1544-1545.

After judgment attached property must be sold on execution.

Subdivision 2 Sec. 4315, Revised Codes of Idaho.

The judgment was rendered on the 15th of February, 1909, and the execution issued on the 8th of March, 1909. Mr. Harry Lydon was not the sheriff after the second Monday of January, 1909, and he had no more authority to sell the property on an execution issued on the 8th of March, 1909, than any other private individual.

## POINT VIII.

The Bank of Nez Perce on the 10th of July, 1908, was given the right to sell attached property at private sale but it repudiated the opportunity and precipitated the litigation that thereafter followed. This fact is important in the matter of overcoming the propositions of the United States District Court which seem to shoulder all blame on Mrs. Pendel, and excusing bank all liability.

## ARGUMENT.

We feel that the case has been argued in the statement of the points and in the citation ofauthority

under the points. So, therefore, we consider that we should avoid repetition as much as possible, at the same time, begging the court to note that we waive no point we have presented by not further arguing any point in this presentation under the sub-head of "Argument."

We know that this brief is already extended and probably more voluminous and comprehensive than it should be, but we feel that the learned United States District Judge has committed many grievous and prejudicial errors against the bankrupt's estate as represented by the bankrupt in the matter of the allowance of the claim of the Bank of Nez Perce as well as against the bankrupt in the other matters considered by the learned District Court, and therefore we think we are not subject to criticism, since we are honestly endeavoring to have corrected what we sincerely and honestly contend are errors which deny justice to the estate of the bankrupt as well as to him individually.

We feel that we must bring to the attention of the court the irreconcilable inconsistencies in the opinion of the learned District Judge.

He first reached the conclusion of law that relief for the wrongful attachment is a counter claim within the meaning of section 4184, Revised Codes of Ida-

ho, and that, because that relief was not had in the original action, section 4185, Revised Codes of Idaho, causes the judgment of the bank to conclude "all claims for wrongful attachment," and then and thereafter, toward the close of his opinion he reaches the other conclusion of law that the estate of the bankrupt has no demand against the bank which is, or can be, a set-off in favor of the estate under section 68 of the Bankruptcy act, and, to prove his conclusion of law, cites In re Becker Brothers, 139 Fed. 366, and fails to consider the case of In re Harper, 175 Fed. 412, which conclusively demonstrates that the holding in the case of In re Becker Brothers is wrong and not law.

One or the other of these conclusions of law must be absolutely wrong. For, a careful reading of the In re Becker Brothers will disclose that the damages were those claimed against a landlord, and, under the Pensylvania statutes, could not be, or become, the subject of litigation in a case in the state courts, maintained by the landlord on the same rent for which he filed his claim against the estate of the Becker Brothers; but, in his opinion here, the learned District Judge had already reached the conclusion that "all claims for wrongful attachment" of personal property were "concluded" by the judg-

ment of the bank, rendered in the state court. So strongly was he impressed with the idea that "all claims for wrongful attachment" were counter claims within the meaning of subdivision I of section 4184, Revised Codes of Idaho, that he extinguished them by section 4185, Revised Codes of Idaho.

But the conclusion of the learned Judge that "all claims for wrongful attachment" are counter claims within the first subdivision of section 4184, Revised Codes of Idaho, and, therefore, by section 4185, Revised Codes of Idaho, extinguished, or merged in the judgment, is absolutely erroneous. We confidently affirm that the case of Willman vs. Friedman, 4 Idaho 209, decides nothing of the kind; *yet, the learned District Judge says that it does.*

To emphasize our point, we ask the court to carefully read the Willman case and find where it says one word about sections 4185, 4184, supra, and section 4183, Revised Codes of Idaho.

The right of the defendant to recover for wrongful attachment by cross-complaint, or by way of cross-complaint, or by way of cross-action, in the original action, wherein the wrongful attachment was issued, was the only question at issue, or decided, in the Willman case, and section 4188, Revised Codes of Idaho, was the only Idaho statute considered or construed.

The question under section 4185, supra, could not arise in the Willman case, at all; for the Willman case was not an action maintained against the plaintiff, independent of the original action, wherein attachment was issued.

We ask the court to carefull read the first subdivision of section 4184, supra, and the second subdivision of section 4183, supra, and all of section 4188, supra, and in connection with their reading also *to carefully read the case of Brosnan, et al vs. Kramer, et al., (Cal.)*, 66 Pac. 979-981, and notice that a wrongful attachment, and claims growing out of a wrongful attachment, do not arise out of the cause of action, or transaction as to the note "set forth in the complaint" of the Bank of Nez Perce "as the foundation" of its claim in the action in the state court, asking for a judgment upon its note, and do not arise out of the "subject of the action "of the Bank of Nez Perce in the state court against the bankrupt and his wife, which subject of the action was the note. In the Brosnan case, the Supreme Court of California very carefully marks these distinctions and qualifications in passing upon the question as to whether an independent action can be maintained on a claim which the defendant in that case contended should have been tried and settled in

a case that they previously had maintained against the plaintiffs' decedent.

Now, returning to section 4188, Revised Codes of Idaho, we first mark the fact that its words are not, at all, the same as the words of section 4184, supra, *and section* 4185, *supra, does not, at all refer to section* 4188.

We find that section 4188 authorizes the filing of a cross-complaint at the same time of filing the answer, or subsequently by permission of the court, setting forth cross-demands against any party to the action for affirmative relief" as to matters "affecting the property to which the action relates." These words to which we call specific attention are not found in section 4184, supra, at all.

Now, it must be noted that whenever the Bank of Nez Perce attached the personal property of the bankrupt it made its action *relate* to the property attached, and the relief for matters "affecting" the property attached was relief on account of the property to which the bank's action related. Consequently, when the Supreme Court of Idaho merely decided that under section 4188, supra, the defendant could file a cross-complaint and recover against the plaintiff for wrongful attachment, it did not decide that, if a cross-complaint was not filed, and relief had, that

section 4185, supra, merged "all claims for wrongful attachment" in the judgment recovered by the plaintiff. In the Willman case, the Court merely decided that for wrongful attachment the defendant could recover on cross complaint in the original action.

Again, section 4185, supra, merely prohibits independent actions subsequently maintained against the former plaintiff on counter claims, arising under subdivision I of 4184, supra, and does not pretend to prohibit the use of these couter claims as a set-off in an action maintained by the former plaintiff against the former defendant. The bankrupt's estate is not now maintaining a new action against the Bank of Nez Perce; the estate is merely opposing the allowance of the judgment as a claim against the estate; the action of the estate is absolutely defensive; the estate maintains no action as a plaintiff against the Bank of Nez Perce. And it is only new independent actions that section 4185, supra, prohibits; consequently, section 4185, supra, for this reason alone, does and cannot refer to proceedings under section 68, Bankruptcy Act.

After the learned District Judge reached the conclusion that the judgment "concluded all claims for wrongful attachment," he says: "But were it oth-

erwise, undoubtedly the second attachment was valid, and the evidence is insufficient upon which to base a finding of damages on account of the execution of the first writ." The court's idea here seems to be that the second attachment is a complete defense simply because it is valid. *This is not the law.*

4 Cyc. 832, and note 12;

Files vs. Davis, 119 Fed. 1002;

Ruthven vs. Beckwith, (Iowa), 45 N. W. 1073;

Empire Mill Co. vs. Lovell, (Iowa), 41 N. W. 583;

Mayer vs. Duke, (Tex.), 10 S. W. 565.

The rule that the difference between the value of the property at the time it was wrongfully attached and the amount it sold for on execution is the measure of the recovery, after execution, for wrongful attachment, which difference is $4665.75, but reduced by the $57.00 and the $131.50 to $4333.50, as we have already stated. This difference could not be ascertained until after execution sale, and, consequently, the cause of action on this rule would not accrue until the execution sale; so, it was utterly impossible for the bankrupt to have recovered the $4333.50 in the original action in the state court under any section of the statute, simply because the right to re-

cover the $4333.50 did not accrue in time to present it by cross-complaint in the original action.

This rule which gives the difference between its actual value and what the attached property sold for on execution and the court's order of sale is based upon just and equitable principles. It admits the right of the plaintiff, who first seized the attached property wrongfully, to subsequently attach it and sell it on execution sale or order of court in attachment proceedings without returning it to the attachment defendant but he must sell it for its actual value on execution and attachment sales, *and, if he does, there can be no recovery for the wrongful attachment.*

Closely related with these principles of the law, there is the other principle that the plaintiff is responsible to the defendant for all waste and destruction of, and injury to, the property while in the hands of the sheriff for the purpose of applying it by legal process to the payment of the judgment. Taking note of the fact that there was great waste of the bankrupt's property, it will be seen that it was impossible for the bankrupt to receive the actual value of the property at time of the attachment on the execution sale, and, therefore, the reasons for applying the rule of such cases as are cited last above becomes apparent.

This brings our argument logically to that rule which holds that a judgment is satisfied to the extent of the property seized where there has been waste and destruction. The learned District Judge absolutely overlooked this proposition of payment, but the Honorable Referee did not.

The Referee says: *"It might also be said that the judgment has been fully paid and satisfied* (17 Cyc. 1395-1396 *and notes* 44-45-48-49; *Banks vs. Evans,* 48 *Am. Dec.* 734; *Brown vs. Kidd,* 34 *Miss.* 291. *The attaching plaintiff has levied on* $6522.00 *worth of personal property to satisfy a judgment for* $3636.15 *or some* $3,000.00 *more than enough to satisfy the judgment. The levy of an attachment or execution on sufficient personal property of the judgment debtor to pay the judgment amounts prima facie to the satisfaction of the judgment* (23 *Cyc.* 1488-1489, *Freeman on Judgments, Vol.* 2, *4th Ed. pp.* 819-'20, *Sec.* 475, *p.* 817. *The amount of personal property is so much greater than the amount of the judgment that it would only be justice and equity to hold that it has been satisfied under the facts in this case. I agree with counsel for both sides that there has been much litigation since the 24th day of July,* 1908, *over this matter, but that does not excuse the destruction of so much property."*

Since the learned District Judge overlooked this principle of law altogether, it must be presumed that, if he had considered it, he would have held with the Referee. If he had not overlooked it, doubtless, he would not have proposed so many questions as to statutes of limitation, nor would he have considered, at length, set-off and counter claim, and it is to be presumed that, if he had noticed this proposition of satisfaction of the judgment, he would have reached the conclusions that his propositions which he makes and advances are not sufficient to overcome the defense of payment and satisfaction of the judgment under the rule of law above invoked by the Referee as to payment and satisfaction of the judgment.

The Referee is an able and skillful lawyer; his opinion shows him to be. He patiently listened to the testimony of the witnesses; he saw them testifying; he is better able to know the exact facts and conditions than any court which may briefly go over the evidence as it appears on paper and who does not listen to the oral testimony and who does not see the witnesses. He was in a much better position to understand the great amount of waste and destruction of property than was the learned District Judge, and therefore, no doubt, the learned District Judge did not attempt to dispute the findings of fact of the Ref-

eree, but rested his decision, overruling the Referee, upon statutes of limitation and technicality, absolutely. But statutes of limitation do not run against payment, nor is set off or counter claim involved in payment.

It has been necessary to transcribe some of the evidence to show the error of the District Judge when he says that the letter—Bank of Nez Perce's exhibit, 19—is the sole evidence of the contract or agreement between Mrs. Pindel and the Bank of Nez Perce for the sale of the attached property at private sale, which agreement the bankrupt asserts, and the Referee finds, was made on the 10th of July, 1908, before Mrs. Pindel employed a lawyer. See evidence of Mrs. Pindel, trans. 53, 54, 55, and evidence of Mr. O'Neil, trans. 56, 57.

The Referee finds that: "When Mrs. Pindel came back from Boise she went to the office of E. O. O'Neil, attorney for the bank and she and Mr. O'Neil agreed to have the property taken under attachment sold and the purchase price applied upon the debt; this was on the 10th day of July. Mr. Dowd was called on the 'phone and told of the agreement, and Mrs. Pindel borrowed some stationery from Mr. O'Neil and made a written statement of the terms of the agree-

ment and mailed it to Mr. Dowd, (this is creditor's exhibit 19)."

But, discussing this feature of the controversy, the District Judge says: "It is said that after the attachment was levied the bank violated an agreement it made with Mrs. Pindel for the sale of the attached property at private sale. The facts relied upon are evidenced solely by a letter written by her to an officer of the bank, and it is only necessary to say that no agreement is disclosed. The letter is wanting in the essential elements of a contract and amounts to nothing more than an indefinite conditional proposal." And the court overlooks the fact that only consent on the part of Mrs. Pindel was necessary to give bank right to sell attached property at private sale and to apply proceeds to payment of debt.

But let it be considered that there was only an indefinite conditional proposal, and that an agreement was not made before the letter was written, yet five hogs were sold under it to Dan Morgan, and the Bank of Nez Perce pocketed the purchase price and has not accounted for it to this day, *and Mrs. Pindel found a purchaser for one of the small teams of horses and Mr. Dowd turned the sale down.*

The referee finds that: "Under this agreement five head of hogs were sold by Mr. Dowd to Mr. Mor-

gan on the 14th of July. On the 17th of July, Mrs. Pindel called up Mr. Dowd and told him she had a buyer for a small team, but Mr. Dowd told her that if she wanted to sell any more she wouldhave to deal with the sheriff. Mrs. Pindel then secured the services of Attorney I. N. Smith and he filed a demurrer on the 24th of July. The first attachment was quashed and a second attachment issued on August 13th."

The letter, properly punctuated to make its meaning clear, referred to by the Referee and by the District Judge, which was written after the agreement and plan for the settlement and payment of the note and expenses were made at Mr. O'Neil's office on the 10th of July, 1908, is as follows:

"July 10, 1908,

I saw Mr. Harry Lydon today and told him the hogs you had attached was in need of feed and I thought best to have them sold to save feed bills on them and, if you are willing to sell them at a fair price and give me credit on the note, do so; also you can have the 200 hundred acres of crop if we can agree on the price of the crop; also some of the small teams, the small teams. Wiley Wagner wants a team. Probably, Johney Klaus would give you a good price for the crop. I will pay as I can. I think probably we can sell enough to settle the account in

full. I want the hacks and buggy sold and the two year old stallion and all of the small teams and now is the time to sell before Harvest. MRS. SARAH PINDEL, do the best you can."

Keep in mind the fact that the arrangement for the sale of the attached property had been agreed upon before Mrs. Pindel wrote this letter, and that this letter was to be Mr. Dowd's written authority to sell the attached property; it was written so that the terms of the arrangement for payment and settlement would not be forgotten. And, of course, the Bank of Nez Perce was not given the arbitrary authority to sell the property at any price, but Mrs. Pindel was to have something to say about the price for which the property would be sold. She says: "We can sell enough to settle the account," meaning that she too was to have some voice in the price for which the property was sold.

When Mr. Dowd told her that, if she wanted to sell "any more she would have to deal with the sheriff," he meant that he would not go on with the arrangement for the sale of the property at private sale, and that he would make no further effort, at all, to agree with purchasers on the price of the property to be sold, thereby to consumate further sale at private sale. This was a repudiation of the authority he had

under the agreement and under the letter. There is no doubt about it.

Of course, Mrs. Pindel did not sell the property to the bank in settlement of the debt; it was only an arrangement for the sale of the property at private sale by the bank and Mrs. Pindel, acting together. Therefore, all had to agree and consent to each sale to each purchaser. It was impossible to fix a fast price for each piece of property, and agree that it should be sold at that, but the idea was to sell to purchasers for prices satisfactory to both Mrs. Pindel and the bank.

This gave the bank an opportunity to make a good faith effort to secure these sales of the attached property to purchasers at private sale and thereby avoid litigation and expenses.

*The bank acted in bad faith.* It forced, as found by the referee, Mrs. Pindel to employ a lawyer; it is responsible for all the litigation and expenses. So, therefore, the repudiation of its authority under the letter puts all blame on it from this time on to the present. The destruction of property was subsequent to Mr. Dowd's repudiation of the opportunity given to him by Mrs. Pindel for sale of attached property at private sale and for avoidance of all litigation and expense.

Consequently, viewing responsibility now from the standpoint of bank's opportunity to get payment of its debt from the proceeds at private sale of the attached property, and seeing its own repudiation of that opportunity, it does seem that there can be no debate about it being liable to the bankrupt's estate for the waste and destruction of the property under some rule of law—liable either under the payment theory or under the counter claim or set-off theory.

Again, to measure the bad faith of the bank, let us quote the Referee's finding as follows: "The trustee under the direction of Mr. O'Neil seized a large amount of personal property not scheduled in the bankrupt's petition and without an order of the referee, which said property was afterwards claimed by the bankrupt's wife and as such was set off to her by the judge of this court, which order was affirmed by the Circuit Court of Appeals."

It seems to be the idea of the bank's crowd to annoy and harass the bankrupt and his wife all they can, and to make them all the cost and expense possible. These things must be considered, and also the fact that no one defended bankrupt's property but his wife while he was in the penitentiary at Boise, Idaho. She gave bank chances to get payment. These chances to get payment of the note and ex-

penses without litigation and the expenses of litigation make the repudiation of the arrangement for sale of the property at private sale emphasize the proposition that it is not right for the court to look everywhere to find some technicality of law to authorize the denial of justice to the bankrupt's estate.

After Mr. Dowd had repudiated the July arrangement to get the debt paid without litigation and expenses of litigation, he levied a second attachment on the property, and the waste and destruction continued. It seems, under these facts and considerations, to be unreasonable to deny the right of the estate to try the case on the merits simply because the bank might not now have the right to sue the sheriff and his bondsmen, or simply because the trustee, who has acted under the orders of Mr. O'Neil—the bank's attorney could not maintain a "plenary" action against the bank on account of section 4054, Revised Codes of Idaho, baring such action.

The learned District Judge says: "True, such suits are often harsh and entail much unnecessary loss, and here the waste of property in expense of litigation, and the deterioration incident to seizure and sale under judicial process, is most deplorable, but for the most part the defendants to the action

must themselves bear the blame." And, straightway, the learned judge puts all the loss against the bankrupt's estate simply because he thinks that Mrs. Pindel" started out with the purpose of evading their just obligations to the bank," and cites the fact that she sold some cattle, which the Referee finds were her own, and out of the proceeds of which she did not pay the note. The learned judge here overlooks the letter and the willingness of Mrs. Pindel to have the note and expenses paid by private sale of attached property.

The learned judge should not excuse the "most deplorable" deterioration of the property which was seized on process of court simply because Mrs. Pindel did not pay the note with the proceeds of her own cattle. We think he should have considered the bank's opportunity to get pay by private sale of the attached property, and Mr. Dowd's repudiation of that opportunity, and have seen that the fault was with the bank for the litigation and expenses and the "most deplorable" deterioration of the property from July 24th, 1908, and down to the present time. Mr. Smith filed the demurrer on the 24th of July and on the 17th of July Mr. Dowd repudiated his chance to get the bank's debt paid by private sale of attached property.

There are many reasons why Mrs. Pindel did not want to pay out her money, if the indebtedness could be settled by private sale of the attached property. She wanted to get her husband pardoned; that would occupy her time; indeed, she neglected the defense of the action so absorbed she was in the matter of securing a pardon; she was not at the trial; the Referee finds that: "Mrs. Pendel returned again to Boise to take up the matter of the pardon of her husband and in her absence and in the absence of her husband on the 15th of February, 1909, a trial was had and a judgment was entered against the bankrupt and his wife for $3635.16."

The Referee also finds that Mr. Pindel, before she executed the note, was "asked for a note, signed by his wife as an accommodation payer; that after much argument and persuasion Mrs. Sarah E. Pindel was induced to sign the note; this note was payable on demand."

Thus, it appears that Mrs. Pindel was not, in fact, liable on the note under the laws of Idaho.

And it must be presumed that she was defending on that issue, but she did not attempt to do so until after the repudiation by Mr. Dowd of the July arrangement for settlement and payment of the note with the proceeds of the attached property at private sale.

She saw there was under-hand-dealing, and that she had made a mistake by going to Mr. O'Neil on the 10th of July, 1908, and attempting to put herself into the hands of the bank, and its officers; she evidently believed they would give her a "square deal" but, when Mr. Dowd deliberately repudiated the opportunity she had given him she, evidently, concluded that she would not get a "square deal" and, therefore had to fight in court for her rights and the property.

Again the Referee finds that "Mrs. Pindel went to Boise during the month of June of the same year," ('908). "to consult with her husband about securing a pardon and in regard to settlement of his business affairs. Both Mr and Mrs. Pindel testify that they talked over the sale of Mr. Pindel's property for the purpose of paying off this note. While she was away, the bank brought this action, and on the 27th of June had an attachment issued."

So the property of Mr. Pindel was to be sold by Mrs. Pindel to pay the note, and when Mrs. Pindel found his property had been attached, she immediately went to the attaching plaintiff to arrange for its sale to pay the note, but, for some reason, after agreeing to such an arrangement or plan, Mr. Dowd repudiated it and forced Mrs. Pindel to defend herself and her husband's property.

Judging the motive by subsequent actions of the officers of the bank, and their persistent effort to get title to the homestead before the matter of the allowance of its claim is finally settled, it is their purpose to punish Mrs. Pindel very vigorously for daring to resent their repudiation of the July plan for settlement of the note by private sale of the attached property by destroying the attached property and thereafter proceeding against the homestead or else, as found by the Referee, it was their purpose in protesting against Mr. Pindel's pardon to make Mrs. Pindel dig "up," since Mr. Dowd, evidently thought that she should pay the note with her own money. It is hard for the bank on the facts to convince an impartial mind that it gave the Pindels a "square deal."

The court says: "The impropriety of the course here pursued is shown in the failure of the Referee to make any finding as to the amount of the counterclaims. He simply finds that they exceed the bank's claim, but if they may be waged as counter claims at all, and if this proceeding be adopted as a method for the liquidation of the damages growing out of the alleged torts, they should be fully liquidated and determined so that the estate may have the benefit of the surplus, if any there be, after off-setting the claims of the bank."

We may criticise the proposition to show that the Referee did exactly right.

For the proposition omits to take into consideration the rule of law as to payment and satisfaction of a judgment where there has been waste and destruction of property, and it omits to take into consideration the fact that the Referee finds that the property, when first attached, was of the value of $6522.00 and that the residue was sold on execution for about $2,000.00; some sold on order of court at $131.50, and some sold by private sale at $57.00. Therefore, the difference between the $6522.00 and the sum of the other amounts, is the amount of the "damages," found by the Referee, which is $4333.50, and that amount does exceed the judgment; *that amount will draw interest* from the date of the execution sale just the same as the judgment.

*Again, we do not know how there can be any judgment given for the surplus in the proceeding on the allowance of a claim.* Anyway, if the learned District Judge has here presented a good point, he should have returned the case to the Referee to supply the findings necessary on this point. But the bankrupt's estate makes no complaint on this matter of not receiving a judgment for the surplus over payment of the judgment, and his estate doubts the jurisdiction

of the Referee under section 68, Bankruptcy Act, to give estate any affirmative relief against Bank of Nez Perce.

The learned judge, as noted in the beginning of the argument, holds that the claims of the bankrupt's estate against the Bank of Nez Perce are unliquidated damages and are not a set off within the meaning of section 68 of The Bankruptcy Act, subdivision a, and we need not now repeat the points we made in the beginning of the argument, but we want to say that the court's view is erroneous. For the Referee had jurisdiction and authority to hear the evidence and thereupon to liquidate the claims of the estate against the bank and, if he found that the amount of the claims of estate exceed that of the bank, thereupon to disallow the judgment of the bank as a claim against the bankrupt's estate.

In re Harper, 175, Fed. 412.

In re Becker Brothers, 139 Fed. 366, is discussed in the Harper case, and clearly shown to be wrong. The reasoning in the Harper case is sound and unanswerable, and should be adopted in the case at bar. If it is not followed here a great wrong will be done to the bankrupt's estate, and a bad precedent established as was in the Becker Brothers case.

The court must not overlook the fact that it is not the bankrupt individually defending, or objecting, but the bankrupt, as it were, is now acting as the trustee of his own estate instead of the actual trustee who it must be presumed, refuses to defend the bankrupt's estate. The individual rights of the bankrupt must not be mixed and confused with the rights of his estate. When this point is comprehended and understood, the propositions of fraud and estoppel, advanced by the learned District Court, estop the estate of the bankrupt to defend against an unjust claim. In this matter of estoppel and fraud, the rights of the creditors of the estate must be taken into the account. If a bankrupt can thus estop his estate to make defenses against the allowance of claims and thereby give payment of a judgment out of the estate which has been paid, or against the owner of which the estate has a set-off, larger in amount than the judgment of the creditor, it will be seen that the court vests in the bankrupt the right to defraud *the creditors of his estate* by withholding set-offs or payment from his schedules, and by not bringing the trial on quickly after he so omits these things from his schedules, and orally informs the Referee. *The bankrupt by the rule would be given power to prefer a creditor as well as to defraud other creditors by helping one creditor to get payment twice.*

Thus the learned District Court is establishing the procedure that a bankdupt can, by withholding true defenses to the allowance of claims, give certain *favored creditors a preference over other creditors of the estate.* Suppose, the value of the homestead had increased to only five hundred dollars above the exemption of $5000.000, and suppose the estate is estopped from making the defenses which prove conclusively that the claim of the bank of Nez Perce should not be allowed as a claim against the estate, and its claim is allowed in the amount directed by the District Court, the fact of the preference, at once, appears; and the conduct of the bankrupt produces the preference of the Bank of Nez Perce over the other creditors of the estate, even though, in fact, the judgment of bank is paid.

For the courts to establish such a rule of law is dangerous, indeed, and proves conclusively that the estate cannot be estopped in the matter of the allowance of claims against the estate by anything which the bankrupt, or his wife, may have done, or may have omitted to do in bankruptcy proceedings.

If another creditor of the estate was making the defense for the estate, he would be making it for the benefit of the estate and not solely for his own benefit, and principles of estoppel which apply to him in-

dividually and not to the estate, at all, certainly, could not be invoked to estop the estate of the bankrupt, and be made the means of giving a creditor the allowance of a claim against the estate which upon the merits should not be allowed at all. And the bankrupt makes the defense for his estate as well as for himself.

The bankrupt, as appears in the petition for bankruptcy and schedules, shows that there was a homestead declaration filed, and that he claimed the homestead as exempt because it then had no value above $5000.00. If this were true there was then nothing for his creditors. At the time of filing his petition the bankrupt also had the right to bring an action for injunction against the enforcement of the judgment on the grounds that it was paid as well as on the ground that he had a just claim of $4333.50 against the bank. The bankrupt did not do this. But, if he had done so, who will hold that he did not have the injunction remedy? *And who will hold that the court would not grant a perpetual injunction against the enforcement of the judgment upon the facts found by the Referee*? If bankrupt had this right upon the facts found by the Referee in the state court, he and his estate have a right to now have the bank's claim disallowed in bankruptcy proceedings.

The same question is now before the bankruptcy court, and, in effect, the estate of the bankrupt by asking a disallowance of the judgment of the Bank of Nez Perce because of the facts found by the Referee is asking a perpetual injunction against the enforcement of the judgment against the estate of the bankrupt. The bankrupt has already been discharged, personally, from the enforcement of the judgment, and, if the facts, found by the Referee are accepted, that discharge in Bankruptcy is the most *equitable and just discharge any bankrupt in all the world has ever obtained*; yet, the District Court has branded it as a fraud.

If the facts found by the referee are given their full force and effect against the Bank of Nez Perce, presumably, it would seem, the District Court brands Frank M. Pindel as a defrauder because of the fact that the bankrupt's estate, in equity, in justice, in right, in law, does not owe the Bank of Nez Perce one cent of money and, too, because the bankrupt was discharged from a debt he did not owe. *Such reasoning is against reason, and the conclusion* of fraud by securing a discharge from judgment, the enforcement of which, in the state court, could have been perpetually enjoined, *cannot be accepted* as a reason for allowing the judgment against the bankrupt's estate.

That the judgment could not be enforced in the state courts against Frank M. Pindel, if he had proved the facts in an injunction action which he has proved before the Referee, showing payment of $4333.50 in addition to what was realized on private sale, on order of sale on attachment and on the execution sale, which was $2188.50 needs no authority to establish . *For a paid judgment cannot be enforced by execution.*. And a paid judgment cannot be allowed as a claim against a bankrupt's estate.

And, furthermore, in connection with this question of estoppel, it must be noted that all the acts upon which the estate depends in the bankruptcy proceeding at bar, as constituting payment, or giving a set-off of $4333.50, happened before the institution of bankruptcy proceedings, and that, therefore, there is nothing, whatever, which the bankrupt could do in instituting the bankruptcy proceedings, or has done subsequent to the institution of bankruptcy proceedings, that can, in the least, change these acts existing previously, or lessen the rights of the estate against the judgment of the Bank of Nez Perce.

*The point is this*: Nothing which the bankrupt did in instituting the proceeding in bankruptcy, and subsequently, made the note, or obligation, on which judgment was obtained in the state court—that was

a pre-existing indebtedness—and nothing which the bankrupt did in instituting the proceedings in bankruptcy, and subsequently made the payment of the judgment, or the set-off of $4333.50—that was pre-existing.

So the idea of estoppel must fall as not being supported by anything, whatever. And as the idea of fraud rests upon the same grounds as does the idea of estoppel, both must be abandoned by the court. Evidently, the learned District Court overlooked these facts and propositions which establish that his ideas of fraud and estoppel have no grounds, whatever, upon which to stand and to be sustained.

The act of Frank M. Pindel in going into bankruptcy took nothing, whatever, in so far as concerned his property, from the Bank of Nez Perce; that act of going into bankruptcy merely changed the remedy of the bank and bankrupt to the Bankruptcy Court; instead of now enforcing the judgment by execution under the state laws, the bank secured the remedy, if its judgment can be collected, of enforcing it against the estate of the bankrupt by filing it as a claim and having it allowed, and paid in due course of bankruptcy administration.

This change of remedy was no fraud; if it was, then no man can go into bankruptcy without committing

fraud, and depriving his estate of all defenses against all claims, filed against it. And furthermore, if going into bankruptcy and securing a discharge from a judgment—not satisfied of record—is a fraud which prevents the estate proving payment, or a set-off to the amount of $4333.50, larger than the judgment, then such fraud will give a preference to such judgment creditor, and unjustly reduce the amount of the estate, and, too, every bankrupt who obtains a discharge from such a judgment has committed fraud though he does not, in fact, owe one cent on the judgment. *The proposition is absurd. The* reasoning which leads to the conclusion of fraud and estoppel is unsound.

This reasoning upon the facts found by the Referee and stated in the Court's Opinion makes the district court give a new meaning to fraud and estoppel. *For the premise, necessarily, upon which the court bases the fraud and estoppel, is that the facts now before the court,* if accepted, and if the proper remedy is given to the estate, will result in a fraud upon the Bankruptcy Court and upon the Bank of Nez Perce and, therefore, the claim of the bank must be allowed although the facts show it should not be allowed. Consequently to prevent the fraud, the claim must be allowed against the estate although, in fact, the es-

tate owes the bank nothing. *Estoppel always estops the truth.* If this is not a fair statement of the position taken by the learned District Court then we have done him an injustice, and we most sincerely beg his pardon; for we do not want to be unjust with the court. We have felt it absolutely necessary to force the District Court's premise to the logical conclusion to demonstrate that there is nothing upon which to base his charge of fraud and the estoppel against the bankrupt's estate, since he bases them on mere irregularity in some of the bankruptcy proceedings.

We shall next consider the question of the validity of the execution sale made by Harry Lydon on the 6th of April, 1909. It must be noted that his term of office expired on the second Monday of the previous January, and that he was not an officer, at all, on the 6th of April, 1909. In connection with the foregoing facts, *it must also be noted that the execution* on which he made the sale was issued by the clerk on the 8th of March, 1909, nearly two months after he ceased to be sheriff, and when he was no officer, at all. *It must be noted, also,* that the Bank of Nez Perce claims that Harry Lydon had a right to sell the property on the execution issued on March 8th, 1909, merely as an ex-sheriff, and not otherwise.

This claim of the Bank of Nez Perce that Harry Lydon, as ex-sheriff, *had authority to sell the property on the execution issued after he ceased to be an officer* is based upon the following statute:

Section 2047, Revised Codes of Idaho.

That statute is as follows, to-wit:

*"Notwithstanding the election and qualification of a new sheriff, the former sheriff must return all process and orders before and after judgment, and must complete execution of all final process which he has begun to execute previous to the expiration of his term of office."*

Now, it is impossible for Mr. Lydon to have commenced the "execution" of an execution, issued on a judgment, recovered on the 15th of February, 1909 when his term of office expired on the second Monday of the previous January. To contend that he did commence the execution of such a process before the second Monday of January, 1909, *is absurd, indeed.* Yet, that is precisely what the Bank of Nez Perce does contend.

And, to support its contention, it cites some cases where it has been held that, when an ex-sheriff has attached property previous to the expiration of his term of office, he can, as an ex-sheriff continue to hold the property under attachment and that, as long

as he is thus executing the writ of attachment by holding the attached property to be sold on execution, he is executing authority vested in him by a statute like section 2047, supra. One case, cited by the bank to Referee held that the ex-sheriff *had a right to thus hold the attached property until his fees were paid.*

The bankrupt's estate can safely concede that all this authority cited by the Bank of Nez Perce give correct rules of law; *for the right of an ex-sheriff,* thus holding property on a writ of attachment, *to sell that property on execution, issued after he ceased to be an officer, is, in such cases, neither discussed nor decided;* consequently, none of such cases are in point, at all.

We must search for cases which are exactly in point, and we can find them, easily. An ex-sheriff, thus holding attached property, can not sell it on execution when the writ of execution has been issued after his term of office expired; and he has no more authority to make the execution sale than any other private individual.

Fletcher vs. Morrel, (Mich.), 44, N. W. 133;

Kent vs. Roberts, 14 Fed. Cas. No. 7, 713, 2 Story, 591;

35 Cyc. 1543-1544-1545.

The sheriff who has attached property can not retain it for purpose of sale under final process. 35

Cyc. 1544. The ex-sheriff cannot undertake new business. 35 Cyc. 1545. He has no more authority to execute writs issued after his term of office has expired and he has become an ex-sheriff than any other private individual. 35 Cyc. 1545, and note 27.

A writ of attachment is not a final process issued after judgment, but is merely a process by which property is held, and creates a lien on the property attached, and specially segregates it for sale on final process, issued after judgment; it must be sold on execution after judgment.

Subdivision 2, section 4315, Revised Codes of Idaho.

The court may order the attached property sold before judgment, and consequently before execution.

Section 4312, Revised Codes of Idaho.

But, where it remains unsold until after judgment, it must be sold on an execution issued on the judgment (subdivision 2 of section 4315, supra), and the judgment against the Pindels was recovered on the 15th of February, 1919, nearly two month after Mr. Lydon's term of office expired, which facts are found by the Referee, and not otherwise found by the District Court.

*Thus, the authority forces the court to the conclusion that the execution sale made by Harry Lydon on the 6th of April, is absolutely void as concluded*

*by the Referee.* Since this execution sale is absolutely void, the bank can not justify under it, but must account for the actual value of the property less the amounts it got from private sale, from sale on attachment, and from this sale on execution. *This is a sufficient reason to uphold the Referee's order, disallowing the judgment of the bank of Nez Perce, even if all the rules of law hereinbefore contended for are not accepted by the court.*

But we must not be confused and mixed by the many rules of law, applicable to the defenses of the estate against the allowance of the bank's judgment as a claim against the estate.

For; First: To recover the $4333.50, as hereinbefore explained, for the first and wrongful attachment, it is not necessary to find that the execution sale is void; for it can be valid, andthe difference between what the property sold for on execution and its value when wrongfully attached is the measure of recovery, and a subsequent valid attachment can not deprive the estate of the right to recover the $4333.50, or its right to set-off enough of it against bank's judgment to wipe out that judgment, and, to recover under this rule of law, the bankrupt's estate did not have to prove waste or destruction of property.

Second: To have the $4333.50 applied on the judgment in satisfaction and payment of it, the estate is not required to prove that the first attachment is void or that the execution sale is void, but both may be assumed to be valid as well as the second attachment, and all that the estate must prove, therefore, is that the property was wasted, destroyed, and injured, by the negligence of the sheriff and his keepers.

Third: To recover the $4333.50, or to have it set-off against the judgment of the Bank of Nez Perce, the first attachment, the second and the execution sale may be assumed to be valid, and, therefore, all that the estate would have to prove is that the property was wasted, destroyed and injured by the negligence of the sheriff and his keepers.

Fourth: To recover the $4333.50, or to have it set off against the judgment of the bank, it may be assumed that the attachments were valid, and all that the bankrupt's estate would have to prove was that the execution sale was void.

So the bankrupt's estate has four contentions on any one of which it can succeed on the facts found by the Referee, and have the judgment wiped out and disallowed.

Under any one of the four contentions: When did the estate's right accrue? The question answers itself; for $4333.50 is the difference between what the bank got for the property and what it was worth when attached, and that difference could not be ascertained until after the execution sale on the 6th of April, 1909.

The Referee saw and recognized that the estate's right did not accrue until after April 6th, 1909. For he says: "There being a void attachment and no return of the property to the defendant and a void sale under execution, there was a continuing damages and therefore the defendant's right of action did not fully accrue until after judgment and execution, and the defense could not have been set up in an answer or cross complaint."

The Referee here was giving his reason why, in his opinion, the bankrupt did not have to claim the defense of the estate in an answer or a cross-complaint in the original action, and why he could not. The reason *that the defense did not accrue until after execution sale is as complete and as perfect a reason as can be given by any one.*

Under any of the four contentions of the bankrupt's estate, last above stated, the estate's defense to the allowance of the bank's judgment against the

estate as a claim to be paid in due course of administration, *did not accrue until after the execution sale.*

Having now seen that there is no way to prevent the estate having relief on the merits, it follows that the claim of the Bank of Nez Perce must be disallowed, and the United States District Court reversed because of the technicality which has denied the estate relief on the merits.

We can now proceed to the consideration of the matter of confirmation of the sale and the failure of the United States District Court to affirm the order of the trustee, fixing the expenses of the trustee, his attorney's fee, his commissions and the Referee's own commissions up to the time of the hearing before the Referee. The bankrupt wished to pay the entire indebtedness of the estate in full and thereupon have the trustee discharged and the estate closed, and, therefore, if the District Court did not wish to affirm order of Referee as to costs and expenses he, himself, should have fixed the amount.

If bankrupt is able to thus make full payment, he has done better than any other bankrupt in the United Stated, and he, therefore, should not be so severely criticised by the District Court, but, in paying his estate's debts in full, he did not want to pay the judgment of the Bank of Nez Perce, *since neither he*

*or his estate owed it after the execution sale on the 6the of April,* 1909, and since the Bankruptcy Court has jurisdiction and power to so adjudicate in the proceeding at bar, nor does he want to pay exorbitant expenses of administration, nor does he think that the trustee has a right to wrongfully and unlawfully seize his wife's property and charge his estate exorbitant, or any, expenses in the perpetration of this tort and wrong.

In commenting, and deciding on the right of the bankrupt to have all liability of the estate determined for the purpose of his paying everything in full, the Referee says: "I would not pass on this account at the present time as the Referee has directed that the original receipts and vouchers be filed by the Trustee or his attorney but now after almost a year has expired this has not been done but the bankrupt has prayed for a settlement in the nature of a Composition under the bankruptcy act and I will do the best I can to adjust the whole matter."

The Bank of Nez Perce, the Trustee and the Trustee's attorney were participating in the hearing before the Referee on all the foregoing matters, and all of them petitioned for review of the Referee's order; evidence was introduced and received by the Referee on everything he adjudicated in his order; the par-

ties have had their day in court. And it seems to be wrong and erroneous for the United States District Court to return the matter to the Referee for furthen evidence and litigation as to the amount of the cost of administration up to the time of the hearing before the Referee.

*The Referee estimated the total cost up to the time of finally closing the estate, and placed all liability of the estate at the total sum of* $631.56.

*What other additional cost could there be than the mere expense of preparing the Trustee's final report to the Referee*? Every liability of the estate would be paid in full, and who could complain. Though, if notice of this final settlement had to be given by the Referee, the bankrupt pledges himself to pay the cost. He agrees to pay all administration cost in addition to that found by the Referee if there is anything to be done in the future to close the estate in the way of making a final report and notice of hearing on the report. *This additional administration cost could not be very great.*

To establish the error of the District Court in leaving the question of the fee of the attorney for the Trustee, and the charges of the Trustee against the estate, and his commissions and the commissions of the Referee, for future litigation and contention, let

us assume that by future order the Referee fixes the amount of expenses of the Trustee at the same figures he did in the order reversed by the District Court, and finally the claim of the Bank of Nez Perce is allowed in the sum directed by the District Court, then only $3926.19 will be required to pay everything in full, and the United States District Court requires $5500.00 and interest thereon to be paid in redemption of the homestead from administration. Here then is an excess of $1573.81 with the interest added, that the United States Court requires the bankrupt to pay to the Trustee. What is to be done with this excess? It should not be wasted in expensive litigation waged by the Bank of Nez Perce and the Trustee and the Trustee's attorney. The bankrupt is entitled to some consideration, and given a proper chance to protect his homestead from sale, when he desires to pay in full.

Again, suppose the Honorable United States Court of Appeals agree with the Referee that the claim of the Bank of Nez Perce should be disallawed, *then the United States District Court requires the bankrupt to pay to the Trustee a sum in excess of what the Referee holds the estate justly owes in the amount of over* $4868.44.

The District Court, in considering the branch of the hearing relating to the expenses of administra-

tion, suggests the right of creditors of the estate to object to the Trustee's report and this suggestion indicates that the court overlooked the proposition of the bankrupt to pay the claims of the creditors in full. *If their claims are paid in full, it is self-evident that they have no interest, whatever, in the question of the costs and expenses of administration; the question would be exclusively between the bankrupt and his wife, on the one side, and the Trustee and his Attorney, on the other side.*

To give the bankrupt the right to pay all the liabilities of his estate, and he pays them, it is very apparent to any one that there is no necessity to take the estate through the ordinary proceedings of the Trustee making a report, the creditors having a chance to object to it, and no necessity for the Trustee paying prorata to the creditors on the order of the Referee. Has the Bankruptcy Court the jurisdiction and power to settle the estate as solvent?

If the Referee has the authority to order prorata distribution of an estate which is insolvent, he certainly has the authority, power and jurisdiction, to order full payment of all claims and expenses of the estate which, by increase in the value of its property, has become solvent, and, to be able to thus order full payment, he has the authority to ascertain the

total liability of the estate so as to give the Bankrupt or his wife a proper and just opportunity to pay to the Trustee every Dollar and every cent necessary to the Referee's order to the Trustee to pay everything in full; *so that thereby the estate will pay one hundred cents on every dollar of its indebtedness, and its liabilities.*

And, in order to pay everything in full, the Referee must determine what claims of the claims filed are owed by the estate; *to distribute an insolvent estate,* the Referee has to ascertain the total liabilities of the estate.

*The estate of Frank M. Pindel has never been in a condition where the Referee could make a partial distribution among the creditors* if the homestead had been sold long ago. *For the claim of the Bank of Nez Perce had never been allowed until the decision of the District Court in the present proceedings. The granting of the order of sale, the finding that the homestead was worth* $9000.00 *and should be sold, never allowed the claim of the Bank of Nez Perce.* This is self-evident.

The claim of the Bank of Nez Perce has now been ordered allowed by the District Court in the sum of $3294.53, and the other claims allowed against the estate amount to $258.50. These two sums constitute the total amount of claims allowed against the es-

tate by the Referee and the District Court; and there are no other claims.

The total amount of claims, therefore, is exactly $3553.03, and, deducting this from the $5500.00 without computing the 7 per cent interest required to be paid, we have a difference of $1946.17.

There is no use for the $1946.17, and the seven per cent interest on the $5500.00, except only payment of costs of administration. *If, therefore, the Trustee and his attorney, can push the costs and expenses of administration above* $1946.17, *they certainly have consumate skill in the matter of making the settlement of a small estate swell unto the unreasonable.* There can be no just reason for requiring this large amount to be paid to Trustee when the Referee finds that total costs and expenses are only $373.06 and the United States District Court does not find that they are, or can be, more than $373.06.

Probably, the Court may say that if the homestead is worth Fourteen to Fifteen Thousand Dollars, it will be easy to borrow some $6000.00 or more on it, and, as the surplus, over paying everything, will be returned to the bankrupt, or his wife, the fact that the District Court required him to pay to the Trustee $5500.00 with interest thereon is not a prejudicial error. But it is much easier to borrow the smaller amount.

There is nothing to establish the rule of money loaners as to the amount which can be borrowed and the Referee has made no finding as to such a rule. Likely, therefore, it is safe to assume that the money loaners would not loan more than one-third of the value. At a value of Fifteen Thousand, on the one-third rule, Five Thousand Dollars can be borrowed, but at the value of Fourteen Thousand only $4666.66 could be borrowed and at the value of $10500.00 only $3500.00 could be borrowed; consequently, it appears that the requirement to pay in more than can possibly be used to pay the liabilities, including costs of administration, and everything, within 35 days might result in the confirmation of the sale, and in giving Mr. Collins a profit of Four Thousand and Five Hundred to Five Thousand Dollars; for he could sell the homestead at private sale, and get its true value.

*Consequently, more time should be given for paying in the required amount if the sale is to be confirmed.* If the sale is not confirmed, a reasonable time should be given to the bankrupt or his wife to pay in the amount necessary to settle the estate as a solvent estate before a new sale is ordered. The bankrupt and his wife should be given a reasonable opportunity to settle the estate as solvent.

*If the Bankruptcy Court is without jurisdiction to settle the estate as a solvent estate, then the bankruptcy adjudication and the discharge of the bankrupt should be set aside, and the Bankruptcy proceedings dismissed, and let the parties concerned fight it out in the state courts.*

But, since the estate became, by increase in the value of the property, solvent subsequent to the Bankruptcy adjudication as found by the Referee, the Bankruptcy Court has jurisdiction to settle and close it as a solvent estate, and, therefore, the bankrupt and his wife now have the undoubted right to pay all liabilities in full, and the Bankruptcy Court has the undoubted jurisdication to ascertain the amount of all liabilities and to receive that amount from the bankrupt or his wife, and settle and close the estate as solvent. It is not a startling proposition.

*It may be a new question in bankruptcy; yet, it must be adjudicated in the light of justice to the bankrupt and his wife,* and, since it conclusively appears that the estate is now solvent, that fact should be a great reason for disaffirming the sale to Mr. Collins. Especially is this so, since he is president of the Bank of Nez Perce and, since the bank pushed the sale of the homestead and did not push the mat-

ter of the allowance of its claim against the estate, and, since the bank's claim is, practically the claimed indebtedness of the estate.

Since the sale was subsequent to the year allowed for filing claims and, since the bank pushed the sale of the homestead and did not push the matter of the allowance of its claim, and, since the Trustee pushed the sale of the homestead and did not push the objections to the allowance of the claim of the bank, and did not require the matter, as to the allowance of the claim of the bank, to be adjudicated before sale of the homestead, and, since the homestead is worth so much more than the $10,500.00, and, since the creditors had no notice, and Mrs. Pindel had no notice, and the order of sale was ex-parte, and notice and order of sale differ, *there should be no hesitation in disaffirming the sale,* especially, since the bankrupt and his wife now ask that the total liability be ascertained so that they can pay it to the Trustee and thereupon have the estate closed as solvent and not as insolvent.

Neither the bankrupt nor his wife should be required to pay unjust debts nor unjust expenses, or expenses made by the Trustee in committing torts

under direction of the attorney for the Bank of Nez Perce.

Respectfully submitted,

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